

# **Max Mosley goes to Strasbourg: Article 8, claimant notification and interim injunctions**

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## **Introduction**

Lawyers acting for Max Mosley, following his victory in the High Court in London, have lodged an application at Strasbourg. They argue that English law is in violation of Article 8 of the Convention because it allows newspaper editors a complete discretion as to whether or not to contact potential claimants before stories invading their private lives are run. When editors chose not to notify such claimants, the effect is usually to deprive them of any opportunity to apply for an interim injunction to prevent publication. The basic argument is therefore that, in order to ensure effective protection for Article 8 rights, UK law needs in some way to provide that newspaper editors, before publishing such stories, should contact their subject (I shall refer to this as the ‘notification requirement’). At the time of writing, the Select Committee on Culture, Media and Sport<sup>1</sup> is conducting an enquiry into privacy and libel laws, including consideration of the desirability of a notification requirement. It is also of course possible that, in a suitable case, a domestic court will be invited to rule on the point, given that it is unlikely that Strasbourg will consider the Mosley case in the near future. This article considers the merits of the arguments for a notification requirement.

The facts of the *Mosley* case are well known: in March and April 2008, the *News of the World* published a series of articles revealing that Max Mosley, President of the Fédération Internationale de l’Automobile (F1) had engaged in group sex sessions, of a mildly sado-masochistic nature, with five prostitutes, in private, residential property. The information for the story had been obtained from one of the prostitutes hired to take part in the sessions, who had also used a hidden camera to make a video recording of the sexual activity.<sup>2</sup> The video accompanied the story,

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<sup>1</sup> Hereafter, in the text, ‘The Select Committee’ and in footnotes, ‘SCCMS’.

<sup>2</sup> [2008] EWHC 687 (QB) (hereafter *Mosley I*), [5]. As described by the judge, the footage contained: ‘shots of Mr Mosley taking part in sexual activities with five

which was headlined, ‘F1 boss has sick Nazi orgy with 5 hookers’ and contained explicit detail of the sexual activity, as well as numerous still photographs. The story alleged that the sexual role-play had Nazi overtones, an allegation that was found to be false at trial – a major reason why the judge concluded that the story had no public interest value. The litigation was in two stages: in the first, Mosley sought an interim injunction against further publication of the story and an order that the video be removed from the *News of the World*’s website; this application was refused.<sup>3</sup> At the trial of the action, the judge found in favour of Mosley’s claim for infringement of his privacy,<sup>4</sup> awarding an unprecedented £60,000 in damages.

## **Is an interim injunction generally the only effective remedy in privacy cases?**

### *Academic and judicial opinion*

The first stage in the argument is to ascertain whether interim relief, in the form of an injunction, is of particular importance as a remedy in cases concerning private and/or confidential information. After all, the settled rule in the related field of defamation is that injunctions are *not* available where the defendant intends to plead justification (truth) and the Court of Appeal recently ruled that this remains the position following the Human Rights Act.<sup>5</sup> However, it is immediately obvious that, as the author has previously argued,<sup>6</sup> obtaining such injunctions is critical in privacy cases, far more so than in defamation. This is because damage done to reputation by initial publication can be subsequently restored by a public finding that the allegation was false. An example is the recent Rushdie case:<sup>7</sup> the well-known author won a libel case in August 2008 in respect of various allegations made about him by one of his former police bodyguards. Rushdie, recognising the ability of a definitive court statement setting out the erroneous nature of the allegations to restore the damage to

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prostitutes...The session seems to have been devoted mainly to activities which were conveniently described as “S and M.””

<sup>3</sup> *Mosley I*.

<sup>4</sup> Hereafter *Mosley II* [2008] EWHC 1777 (QB) [2008] EMLR 20. For comment, see K. Hughes, ‘Horizontal privacy’ (Case Comment) (2009) 125(Apr) LQR, 244.

<sup>5</sup> *Greene v Associated Newspapers* [2005] Q.B. 972.

<sup>6</sup> ‘Breach of Confidence as a Privacy Remedy in the Human Rights Act Era’ [2000] 63(5) MLR 660, 691.

<sup>7</sup> ‘Rushdie wins apology - and spurns cash - in libel case’ *Guardian* 27 August 2008.

his reputation, decided not to claim any damages: he was content with a declaration of falsity. Since the essence of a libel claim is that the allegations were untrue, the authoritative finding by a court of their falsity largely restores a damaged reputation. In contrast, if private information is made public by a newspaper article, the law can seek to compensate for this harm at final trial by awarding damages, but it cannot in any way cure the invasion of privacy: it cannot erase the information revealed from peoples' memories. The outcome of court cases cannot *restore* privacy in the way that it can restore reputation. As Professors Leigh and Lustgarten have commented: 'the interim stage is the critical one. It is effectively the disposition of the matter'.<sup>8</sup> This is practically so also because, if an injunction is refused, and the information enters the public domain, many claimants will take the view that it is futile to continue with the litigation. Thus as two media lawyers put it: 'In breach of confidence...the critical stage is usually the application for an interim injunction...If the publisher is able to publish...the action will often evaporate...'.<sup>9</sup>

There is overwhelming agreement on this point, not only from leading academic authorities in the field of privacy, but also from UK courts and other jurisdictions. Professor Barendt, author of the seminal comparative study, *Freedom of Speech*, has argued that:

'If the publication disclosed material which an applicant was entitled and wanted to keep fully confidential or private...an injunction would then be *the only effective remedy*.'<sup>10</sup>

The same point is made by one of the leading authorities on privacy, Professor Raymond Wacks. He comments on this point:

'In many cases, in exercising its discretion not to grant the plaintiff interim relief, the court is effectively deciding the substantive issue. This is particularly so in personal information actions...Because the plaintiff's only

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<sup>8</sup> I. Leigh and L. Lustgarten, 'Making Rights Real: the Courts, Remedies, and the Human Rights Act' [1999] 55(3) CLJ 509, 533 (referring to the granting of interim injunctions generally); see also 551.

<sup>9</sup> G. Robertson and A. Nicol, *Media Law* (London: Penguin, 3rd ed, 1992), 190.

<sup>10</sup> E. Barendt, *Freedom of Speech* (OUP, 3rd ed, 2006), 137 (emphasis added).

concern is usually to prevent the information from being disclosed at all, the plaintiff will rarely proceed to trial after failing to gain interlocutory relief".<sup>11</sup>

This was recognised by Eady J in the *Mosley* case itself:

Whereas reputation can be vindicated by an award of damages, in the sense that the claimant can be restored to the esteem in which he was previously held, that is not possible where embarrassing personal information has been released for general publication. As the media are well aware, once privacy has been infringed, the damage is done and the embarrassment is only augmented by pursuing a court action. Claimants with the degree of resolve (and financial resources) of Mr Max Mosley are likely to be few and far between. Thus, if journalists successfully avoid the grant of an interlocutory injunction, they can usually relax in the knowledge that intrusive coverage of someone's sex life will carry no adverse consequences for them...<sup>12</sup>

As Mosley himself has put it:

if you go to court, [even if] you win...you are going to have the entire matter debated in public...That which was private that you did not want published, will be published all over again in more detail with [the newspaper] able in court to make any allegation they like about you because...their witnesses [are covered by] absolute privilege...<sup>13</sup>

Sir Christopher Myers, Chair of the Press Complaints Commission, made the same point, although in this case he was using it to argue for the superiority of the PCC route over a trial for damages:

The great deterrent on [taking] a privacy case into the courts is because if you are concerned that some intimate detail of your private life has been

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<sup>11</sup> *Privacy and Press Freedom* (Blackstone, 1995), 156.

<sup>12</sup> *Mosley II*, [230].

<sup>13</sup> SCCMS, Oral evidence, HC 275-i, Q 122 (2008-09). Absolute privilege is afforded to fair and accurate reportage of court proceedings: Defamation Act 1996, s 14.

exposed... the very sin of which you were complaining...is then thrown into open court where every nook and cranny and crevice - almost literally in Mr Mosley's case - is then exposed to the public gaze over and over as prosecution [sic] and defence throw the shaved buttocks backwards and forwards across the courtroom.<sup>14</sup>

Numerous other judicial decisions have recognised the point that 'an injunction is the primary remedy for a claimant who wishes to protect privacy.'<sup>15</sup> The Court of Appeal has recently noted that, 'Confidentiality...will be lost completely if an injunction against disclosure is not granted when appropriate',<sup>16</sup> while the House of Lord's leading judgment on interim injunctions under the Human Rights Act has noted that, 'Confidentiality, once breached, is lost for ever.'<sup>17</sup> In an important decision on privacy under the Human Rights Act, the Court of Appeal recognised that, '...if the injunction is not granted, the claimant may be deprived of the only remedy that is of any value'.<sup>18</sup> Indeed, 'If an interim injunction is to be granted, it is essential that it is granted promptly because otherwise the newspaper will be published and then, from the claimant's point of view, the damage will have been done.'<sup>19</sup>

The second Court of Appeal judgment in the well known *Douglas v Hello* litigation<sup>20</sup> also affirmed this point:

Damages, particularly [a modest] sum, cannot fairly be regarded as an adequate remedy...Particularly in the light of the state of competition in the newspaper and magazine industry, the refusal of an interlocutory injunction in a case such as this represents a strong potential disincentive to respect for aspects of private life, which the Convention intends should be respected.<sup>21</sup>

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<sup>14</sup> SCCMS, Oral evidence, HC 275-v, Q 346 (2008-09)

<sup>15</sup> Matrix Media and Information Group, *Privacy and the Media – the Developing Law* (2002), 52.

<sup>16</sup> *Greene v Associated Newspapers* [2005] Q.B. 972, [78].

<sup>17</sup> *Cream Holdings Limited and others v. Banerjee and others* [2004] 3 W.L.R. 918.

<sup>18</sup> [2002] 3 WLR 542, [11](ii).

<sup>19</sup> *Ibid*, [7].

<sup>20</sup> *Douglas v Hello! Ltd* (No 3) [2006] QB 125.

<sup>21</sup> *Ibid*, [257].

It concluded that, ‘Only by the grant of an interlocutory injunction could the Douglases’ rights have been satisfactorily protected.’<sup>22</sup>

This fundamental point as to the particular importance of injunctive relief to the protection of privacy has also been appreciated elsewhere in Europe. Professor Barendt notes that, ‘In many jurisdictions, courts may grant injunctions to stop the issue of publications which, it is argued, would amount to a breach of confidence [or] infringe personal privacy.’<sup>23</sup> This is the case, for example, in France and Germany. As one commentator on French Law points out, ‘Article 9 of the Code Civil allows an efficient protection, i.e. the seizure of the contested publication, for ‘unbearable breaches’ of private life or for breaches of the ‘intimate private life.’’<sup>24</sup> She goes on to note:

In most cases, plaintiffs prefer to prevent or to stop a breach to their ‘intimate private life’ happening. As a result, *this emergency remedy has become the general remedy* for the protection of private life, as opposed to normal procedures where judges award damages after the breach has happened.<sup>25</sup>

The authors of a recent leading work on civil law protection for privacy and personality remark that:

‘The efficiency of the protection depends here, more than in other fields, on rapid judicial intervention, especially when the alleged violation of the right to...one’s private life occurs in a transitory publication such as a newspaper or magazine. After a few days the violation is complete and measures aimed at preventing the publication would no longer make any sense’.<sup>26</sup>

They go on to cite a French commentator, who notes that injunctive relief is necessary in cases of disclosure of intimate personal information, since ‘the later award of

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<sup>22</sup> *Ibid*, [259].

<sup>23</sup> *Freedom of Speech*, 117.

<sup>24</sup> C. Dupre, ‘The Protection of Private Life Against Freedom of Expression in French Law’ (2000) 6 EHRLR 627, 649.

<sup>25</sup> *Ibid*, 642 (emphasis added).

<sup>26</sup> H. Beverly-Smith, A. Ohly and A. Lucas-Schloetter, *Privacy, Property and Personality* (CUP, 2005), 182.

damages cannot adequately redress this kind of harm'.<sup>27</sup> Similarly in German law, interim injunctions may be obtained to prevent publications interfering with rights of personality. Professor Barendt notes that, while censorship is prohibited by Article 5(1) of the Grundgesetz (Basic Law), this 'has never been applied to preclude the granting of a temporary judicial order (*einstweilige Verfügung*) to prevent a publication.'<sup>28</sup> Injunctions may therefore be granted if the applicant's claim appears to be 'well-founded' and where interim relief 'is necessary in order to prevent a significant detriment.'<sup>29</sup>

The European Court of Human Rights has itself recognized the particular importance of injunctive relief in this area, in the well known *Spycatcher* case,<sup>30</sup> which concerned a challenge to the compatibility of interim injunctions made by UK courts to prevent publication of the book *Spycatcher*. The initial injunctions, which prevented publication of extracts from the book in UK newspapers for over a year, were found not to violate Article 10: they were held to be justified on the basis that they had the aim of maintaining the Attorney-General's ability to bring a case claiming permanent injunctions. As the Court said, the UK courts granted these injunctions, because:

to refuse interlocutory injunctions would mean that [the newspaper] would be free to publish that material immediately and before the substantive trial; this would effectively deprive the Attorney General, if successful on the merits, of his right to be granted a permanent injunction, thereby irrevocably destroying the substance of his actions.<sup>31</sup>

It was on this basis that the Court found no violation of Article 10 in relation to the temporary injunctions up to 30 July 1987 (after which the secrecy of the information was lost by publication abroad). It may be argued that the same considerations do not always apply with information relating to private life, as opposed to state secrets –

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<sup>27</sup> Ravanas, 'La protection des personnes contra la réalisation et la publication de leur image' LGDJ 1978, P. 459. See also Derieux, 'Référé et liberté d'expression, JCP 1997 I, 40533, No. 6.

<sup>28</sup> *Freedom of Speech*, 125.

<sup>29</sup> If there has not yet been any publication, 'the claimant must show that an imminent danger of a violation exists': n 26 above, 139.

<sup>30</sup> *Observer and Guardian v UK* (1991) 14 EHRR 153.

<sup>31</sup> *Ibid*, [62].

with which *Spycatcher* was of course concerned. As noted below,<sup>32</sup> English courts now seem to take the view that prior publication may not destroy a claimant's claim in relation to personal information, particularly if the case concerns photographs. If this rule becomes firmly established in English law, it would render the Strasbourg reasoning in *Spycatcher* less applicable to such cases, but it is submitted that this is not yet the case - as the failure of Mosley's attempt to procure the removal of the video from the NoW website vividly demonstrates.<sup>33</sup>

### *Does Strasbourg require injunctive relief for the protection of Article 8 rights?*

Until Max Mosley's case is heard, we will not of course know for certain whether Strasbourg requires effective access to a preventative remedy in cases concerning media publication of private information. Many Convention lawyers might well seek to refute the argument that the Convention could impose any such specific requirements: it would be pointed out that when considering the state's positive obligations to ensure respect for private life in the context of regulating relations between private individuals, the effect of the wide margin of appreciation that the Court applies in such cases is that the *means* of securing such 'respect' is left within the discretion of the state. As the Strasbourg court has remarked on a number of occasions:

...as regards such positive obligations, the notion of 'respect' is not clear-cut. In view of the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention, account being taken of the needs and resources of the community and of individuals.<sup>34</sup>

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<sup>32</sup> See 000-000.

<sup>33</sup> See below, text to n 48 et seq.

<sup>34</sup> *Armonas v Lithuania*, 36919/02 (25 Nov 2008, [38]; *Johnston and Others v. Ireland*, (1986), A 112, [55].

Therefore, the argument would go, states *cannot* be required by Article 8 to provide for any particular remedy in national law. Such an argument, however, is now out of date. First of all, the recent decision in *Armonas v Lithuania*<sup>35</sup> indicates clearly that the Court *is* now prepared to stipulate as to the remedy required to protect Article 8 rights against the media. The applicant's husband had brought a successful action for invasion of privacy against a newspaper that had revealed his HIV status. National law limited the maximum award for non-pecuniary loss to €2,896. The applicant applied to Strasbourg, alleging that this limit on recovery of damages to such a small sum had deprived her husband of an effective remedy. The Court agreed, finding a breach of Article 8. The state party argued that, 'The State enjoys a wide margin of appreciation in determining the measures required for the better implementation of [the] obligation [to respect private life]...'. The Court 'reiterated' the broad principle set out above, but went on:

The Court nonetheless recalls that Article 8, like any other provision of the Convention...must be interpreted in such a way as to guarantee not rights that are theoretical or illusory but rights that are practical and effective.<sup>36</sup>

Thus, 'the State had an obligation to ensure that the husband was able *effectively* to enforce [his Article rights] against the press.'<sup>37</sup> The Court went on to find that while reasonable limits to the award of damages would of course be permissible, 'such limits must not be such as to deprive the individual of his or her privacy *and thereby empty the right of its effective content*.'<sup>38</sup> The Court found that the severe limit placed upon the quantum of damages was such that the state 'failed to provide the applicant with the protection that could have legitimately been expected under Article 8...'.

It is particularly noteworthy that the Court did not even find it necessary to invoke the Article 13 right to an effective remedy<sup>39</sup> in this case. The applicant argued a breach of that provision, but the Court said simply that in its view 'the complaint under Article 13 as to the absence of an effective domestic remedy is subsidiary to the

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<sup>35</sup> 36919/02 (25 Nov 2008).

<sup>36</sup> *Ibid*, citing *Shevanova v. Latvia*, 58822/00, (2006), [69].

<sup>37</sup> *Ibid*, [43] (emphasis added).

<sup>38</sup> *Ibid* [46] (emphasis added).

<sup>39</sup> Article 13 provides: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority...'

complaint under Article 8.<sup>40</sup> In other words, the low level of damages awarded did not just mean that there was no effective remedy: rather Article 8 itself was breached thereby. The Court thus held that the state's positive obligation to show respect for private life in *itself* requires a certain kind of remedy – a striking example of just how interventionist the Court has become in this area. More practically, this point is of great interest to English lawyers: since the Human Rights Act does not of course incorporate Article 13 into domestic law, this decision allows arguments about remedies for Article 8 to be made in domestic courts purely under Article 8; the non-applicability of Article 13 in domestic law will not be a handicap.

*Armonas* thus disposes of the view that the state's positive obligations under Article 8 cannot impose a requirement for any particular remedy. But more striking still – and of particular relevance to the argument of this paper – is the recent decision in *I v Finland*.<sup>41</sup> In this case, the Court addressed the issue of effective protection for sensitive personal information, in the context of an application alleging a violation of Article 8 in respect of disclosures of the applicant's HIV status from an insecure medical records database. Finding for the applicant, the Court found:

...the mere fact that the domestic legislation provided the applicant with an opportunity to claim compensation for damages caused by an alleged unlawful disclosure of personal data was not sufficient to protect her private life. What is required in this connection is *practical and effective protection to exclude any possibility of unauthorised access occurring in the first place*. Such protection was not given here [and] the Court cannot but conclude that at the relevant time the State failed in its positive obligation under Article 8 § 1...<sup>42</sup>

The Court thus plainly recognized that the absence of effective *prospective* means of ensuring the security of personal information against unauthorized disclosure may itself amount to a breach of Article 8, despite the availability of ex post facto compensatory damages. Once again, the finding was made without the need to rely on Article 13. While this case concerned a breach by a state-run hospital, the same principles would doubtless apply in the context of media intrusion, since as decisions

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<sup>40</sup> n 38 above, [23].

<sup>41</sup> 20511/03 (17 July 2008).

<sup>42</sup> *Ibid*, [47-48] (emphasis added).

such as *Armonas* and *Von Hannover v Germany*<sup>43</sup> make abundantly clear, states owe a positive obligation to their citizens to ensure effective protection of Article 8 against private media bodies also.

### **The central argument: claimant notification essential to effective Article 8 protection.**

There is thus more or less universal agreement that in most cases involving unauthorised disclosure of sensitive personal information, an injunction is the only effective remedy. The Strasbourg court also appears to have accepted that, at least in serious cases, only a method by which such disclosure may be *prevented* can satisfy Article 8. Once this is accepted, it then becomes very hard to regard the current situation, in which newspapers may in effect deny a claimant the right to apply for such an injunction through non-notification as one that assures the ‘practical and effective’ protection for Article 8 that Strasbourg requires.

This is particularly so since it appears that tabloid newspapers often do not give notice, seemingly with the deliberate intention of avoiding the possibility of an injunction.<sup>44</sup> Giving evidence to the Select Committee enquiry, Mark Thomson, of Carter Ruck, a leading claimant firm, said: ‘It used to be when I started in practice the media would notify. Nowadays generally the tabloid media do not.’<sup>45</sup> There is indeed evidence that, in order to avoid the possibility of an injunction being obtained late on Saturday night, Sunday newspapers – the first editions of which are available at about 10pm on Saturday night in central London – sometimes run what is termed a ‘spoof’ first edition, in which the contentious story does not appear; it is included in the

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<sup>43</sup> (2004) 40 EHRR 1.

<sup>44</sup> No notice was given, for example, in *Max Mosley* itself, nor in the recent case concerning the international chef, Gordon Ramsey, in which the News of the World revealed that he was having an extra-matrimonial affair and gave details of recent sexual encounters with this alleged mistress ([www.newsoftheworld.co.uk/news/article83126.ece](http://www.newsoftheworld.co.uk/news/article83126.ece)), and none was given in the singer Madonna’s recent case against the Daily Mail in relation to unauthorised use of photographs of her wedding (‘Madonna claims £5 million for “stolen” wedding photographs’ *The Daily Telegraph* 8 Dec 08).

<sup>45</sup> SCCMS, Oral evidence, HC 275-i, Q107 (2008-09). The Memorandum by Schillings solicitors stated: ‘The *News of the World* admitted in the Burrell case above that they did not give Mr Burrell notice because they were concerned that he might have obtained an ‘unmeritorious’ injunction. Colin Myler also admitted the same in the course of the Mosley...privacy trial.’ (SCCMS, Memoranda: Press Standards, Privacy and Libel (2008-09)).

second edition, which goes out in the middle of the night, making it impossible to stop the story.<sup>46</sup> Essentially, unless the subject of the story happens to be tipped off about it in advance by a rumour, the opportunity to apply for the all-important injunctive remedy is granted or withheld solely at the discretion of a newspaper editor. It may even be said that *in practice* at least the availability of this remedy is not ‘in accordance with the law’ as Article 8(2) requires, since the law in no way governs or even influences whether an applicant has the opportunity to obtain this remedy.

This situation is made all the worse because of the fact that newspaper editors, in deciding whether to notify the potential claimant before publication, have a clear commercial inducement *not* to do so: editors know that if they can once get the story published, not only are any eventual damages likely to be modest, but that most claimants are unlikely to bother to take legal proceedings, being fully aware that their privacy has already been irreparably damaged, and that litigation will only aggravate this fact, by hugely adding to the publicity given to the original revelations. It is submitted therefore that effective protection for privacy cannot, consistently with the UK’s duty to uphold it, be left in the hands of the very persons – newspaper editors – who have least reason to uphold it. Mr Mosley has expressed the point with some eloquence himself:

The moment you say that it should not be obligatory to give the individual an opportunity to take the matter before a judge what you are really saying is that in carrying out this sometimes very delicate weighing balance between Article 8 of the Convention and Article 10 the best and most qualified person to carry out that delicate weighing up...is not a High Court judge but the editor of a tabloid, and not just [any] editor...but the editor...who is dying to publish the very story which is the subject matter of this weighing...To say [this] is so manifestly absurd that I do not think any rational person could support that argument.<sup>47</sup>

The effect of denying the applicant the opportunity to apply for a pre-publication injunction is well illustrated by the fate of Mr Mosley’s application for an

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<sup>46</sup> *Ibid*, Oral evidence of Max Mosley, Q 130: Mosley stated that this occurred in relation to both his and the Gordon Ramsey story.

<sup>47</sup> SCCMS, Oral evidence, HC 275-I, Q 130 (2008-09).

injunction to remove the video from the *News of the World* website, which, it will be recalled, showed intimate details of sexual activity, surreptitiously recorded on private property.<sup>48</sup> Mr Mosley, not having been notified before the story was broken and the video posted on the website, was naturally anxious that at least the video be removed as soon as he became aware of it, pending the trial of his case. However, by the time, the interim application was heard, it was found as a fact that the footage ‘had been viewed about 1,424,959 times’.<sup>49</sup> This was partly because, as is likely to happen with the internet, the video had been copied into other websites, as the judge found:

the footage could have been accessed via the Internet by users who were visiting other websites in which the footage had been ‘embedded’. It was also made available on the Internet by other websites which had copied it while still available on the *News of the World* website. It follows that there are a number of websites (not possible to quantify accurately) where the footage has been available continuously, notwithstanding its removal from the *News of the World* website.<sup>50</sup>

In determining whether to order he should order the removal of the video, despite its massive exposure to the public, Eady J took fully into account the principle enunciated in a number of previous judgments that in relation to the effect of prior publicity, information relating to private life, particularly visual images, should be treated differently from other kinds of confidential information. Whereas it is generally accepted that once confidential information has been publicised, no purpose will be served by granting an injunction, one on the basis that the information’s confidential quality has been irretrievably lost, photographs of private occasions may be treated differently. As the Court of Appeal observed in the *Douglas* case:

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<sup>48</sup> *Mosley I*, [4]: ‘The very brief extracts which I was shown seemed to consist mainly of people spanking each other’s bottoms. There were discreet blocks...to make sure that no private parts were on display (or...the prostitutes’ faces).’

<sup>49</sup> *Ibid*, [7].

<sup>50</sup> *Ibid*, [7] & [8]. The video had been voluntarily withdrawn pending the outcome of the application for the injunction: following the decision not to grant one, it was restored to the *NoW* website.

Insofar as a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be a fresh intrusion of privacy when each additional viewer sees the photograph and even when one who has seen a previous publication of the photograph is confronted by a fresh publication of it.<sup>51</sup>

Similar comments have been made in another decision.<sup>52</sup> It would thus have been theoretically possible for Eady J to order an injunction in this case. Of course, even if he had felt able to do so, the video footage of the S/M activities would have been watched by over a million people and Mr Mosley's sexual life thus comprehensively laid bare to the public. However, in the event, even this unsatisfactory remedy was withheld. The decisive factor was that the footage had by then been copied onto other websites, as the judge found. Thus, even had an order been made that the *News of the World* should remove it from its website, this would not have prevented the footage being accessed from other websites, some of which may have been in other jurisdictions and beyond the reach of UK courts. Eady J therefore took the view that to grant an injunction would have been a futile act:

The Court should guard against slipping into playing the role of King Canute. Even though an order may be desirable for the protection of privacy, and may be made in accordance with the principles currently being applied by the courts, there may come a point where it would simply serve no useful purpose....I have, with some reluctance, come to the conclusion that although this material is intrusive and demeaning, and despite the fact that there is no legitimate public interest in its further publication, the granting of an order...at the present juncture would merely be a futile gesture. Anyone who wishes to access the footage can easily do so, and there is no point in barring the *News of the World* from showing what is already available.<sup>53</sup>

The outcome of this case was therefore as follows: by the simple expedient of not notifying Mr Mosley before the story was broken, the *News of the World* effectively

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<sup>51</sup> *Douglas v. Hello! Ltd (No 3)* [2006] QB 125, 162, [105].

<sup>52</sup> *D v. L* [2004] EMLR 1, [23].

<sup>53</sup> *Mosley I*, [34], [36].

denied him any chance of preventing well over a million people from seeing explicit images of the most intimate sexual activity, secretly recorded on his private property – images that the judge eventually found to be grossly invasive of his privacy and attracting no legitimate public interest. As the judge noted in his final judgment, ‘no amount of damages can fully compensate the Claimant for the damage done. He is hardly exaggerating when he says that his life was ruined.’<sup>54</sup> Mr Mosley himself has said of the effect of such revelations:

It is the most terrible thing you can imagine...It is like taking all your goods, taking all your money; in fact it is worse because if someone took your goods and your money you have some chance of replacing it - even if you are not insured you can work - but if somebody takes away your dignity, for want of a better word, you can never replace it. No matter how long I live, no matter what part of the world I go to, people will know about it.<sup>55</sup>

The position in the related field of the law of defamation is strikingly different. Even though it is widely accepted that the primary remedy for defamatory allegations is damages, English law already lays a strong legal incentive upon media bodies to notify the subject of their stories in advance, and at least give them a chance to comment on them, and ensure that the account published contains their side of the story. This is because newspapers must generally ensure that they engage in prior claimant notification if they wish to be able avail themselves of the public interest defence to defamation set out in *Reynolds v Times Newspapers Ltd*.<sup>56</sup> under *Reynolds* privilege, journalists may escape liability for defamation where the matter published was of serious public concern and they took reasonable care as journalists to verify the accuracy of the story and act responsibly. One of the matters that a court is specifically required to consider under the well known ‘10-point checklist’ is, ‘Whether comment had been sought from the plaintiff in advance of publication’. A failure to do so can be fatal to a claim for public interest privilege.<sup>57</sup> In this respect, *Reynolds* is clearly reflective of the Strasbourg notion that journalism is to be

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<sup>54</sup> *Mosley II*, [236].

<sup>55</sup> SCCMS, Oral evidence, HC 275-I, Q127 (2008-09).

<sup>56</sup> [1999] 3 WLR 1010; [1999] 4 All ER 609, 626.

<sup>57</sup> On this, see *Jameel (Mohammed) v Wall Street Journal Europe* (2004) EMLR 11 (QB); [2005] EWCA Civ 74 (CA); [2007] 1 AC 359 (HL).

exercised responsibly and with due consideration for the rights of others, a notion based partly on the wording of Article 10, that the exercise of free speech rights ‘carries with it duties and responsibilities’; hence the oft-repeated warning that ‘the press must not overstep the bounds set, *inter alia*, for the protection of the reputation of others’.<sup>58</sup> Decision such as *Pedersen & Baadsgaard v Denmark*,<sup>59</sup> *Barford*<sup>60</sup>, and *Radio France*<sup>61</sup> all illustrate this principle well. In *Bladet Tromsø* the Court said that the press should be protected, providing that ‘they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism’.<sup>62</sup> In the admissibility decision of *Times Newspapers v UK*,<sup>63</sup> which concerned the *Louthansky*<sup>64</sup> libel case, the Court noted, as one reason for finding reasonable the High Court courts’ assessment that *Reynolds* privilege was not made out, the fact that, ‘The story was not particularly urgent and Mr Loutchansky had not even been contacted or given the opportunity to defend himself prior to publication.’<sup>65</sup> The proposed notification requirement is thus soundly rooted in Strasbourg jurisprudence, as simply another aspect of the general principle of journalistic responsibility.

Findings made by Strasbourg in the context of Article 13, the right to an effective remedy for violations of Convention rights, are also illuminating. The Court has said that:

‘while Contracting States are afforded some discretion as to the manner in which they conform to their obligations under [Art 13]...*the remedy must be effective in practice as well as in law*’.<sup>66</sup>

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<sup>58</sup> [2002] 3 WLR 542, [41].

<sup>59</sup> 49017/99 (17 December 2004).

<sup>60</sup> *Barford v Denmark* (1989) 11 EHRR 493.

<sup>61</sup> 53984/00 (30 March 2004).

<sup>62</sup> *Bladet Tromsø and Stensaas v Norway* 29 EHRR 125, [65].

<sup>63</sup> *Times Newspaper Ltd v UK* 23676/03 and 3002/03 (2005).

<sup>64</sup> *Louthansky v Times Newspapers Ltd* (No.2) [2001] E.M.L.R. 36 (QB); [2002] Q.B. 783, CA; [2002] EWHC 2490 (QB).

<sup>65</sup> Above, n 63, under 3.(c). For comment, see R. Dunlop, ‘Article 10, the *Reynolds* Test and the Rule in the *Duke of Brunswick’s case* - the decision in *Times Newspapers Ltd v UK*’ (2006) 3 EHRLR 327-339.

<sup>66</sup> *Rotaru v Romania*, 28341/95 (2000-V) GC, [67] (emphasis added).

This is precisely in line with the argument advanced in this paper: whilst a satisfactory remedy in the form of an injunction is available in theory, it is ‘not effective in practice’ if it can be – and is – denied at the discretion of newspaper editors. A leading text on the Convention notes that a wholly discretionary remedy will generally not be an effective one.<sup>67</sup> Moreover, the remedy-granting body must be ‘sufficiently independent’ of the rights-violating body.<sup>68</sup> The precise objection to English law granting newspapers complete discretion as to whether to notify claimants before publication is that the decision whether to effectively deny the only effective remedy for invasion of privacy is made by a body that far from being ‘independent’ of the rights-violator is the violator itself – a body with a clear vested interest in denying the claimant the possibility of seeking that remedy. This is not of course the same position as if the newspaper had the *legal* power to grant or withhold an injunction – an obviously unreal possibility – but it is argued that to allow newspapers this power *in practice* must also be seen as a violation of the Convention.<sup>69</sup>

*Buttressing the notification argument: newspaper stories that pose a real threat to life and limb.*

There is a further consideration which, it is submitted, provides substantial support to the basic argument outlined above. It derives from cases in which courts have made orders against the media to protect the identity of persons seeking rehabilitation in society after serving sentences for crimes that have attracted such notoriety that there appeared to be a well-founded fear that were their identity and whereabouts to be revealed, they would be subject to harassment and possibly vigilante attacks involving serious violence. For example, in *Venables v News Group Newspapers*,<sup>70</sup> Butler Sloss P granted unprecedented injunctions against the whole world preventing publication of any material which might reveal the identity and whereabouts of Venables and Thompson, who many years previously, as juveniles, had murdered the toddler Jamie

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<sup>67</sup> D. Harris, M. O’Boyle, E. Bates and C. Buckley, *Harris O Boyle and Warbrick: Law of the European Convention on Human Rights* (OUP, 2<sup>nd</sup> ed, 2009), 565.

<sup>68</sup> *ibid*, citing *Silver v UK* 13 EHRR 582, [116].

<sup>69</sup> Article 13, although not applicable under the HRA, is binding on the UK at Strasbourg; moreover, as noted above (text to n 39), the notion of an effective remedy appears to have been recently subsumed by the Strasbourg court into Article 8 itself.

<sup>70</sup> *Venables and another v News Group Newspapers* [2001] 1 All ER 908.

Bulger.<sup>71</sup> Such was the degree of public hostility to the two applicants that there was convincing evidence before the court that a failure thus to protect their anonymity could leave the court accused of failing to secure their rights under Articles 2 and 3 of the Convention, in addition to their right to privacy under Article 8. An order was made in similar circumstances in *X (A woman formerly known as Mary Bell) v O'Brien*,<sup>72</sup> ‘to protect the Article 8 rights of the applicant and her daughter, who had on five occasions been forced to move home following the discovery of their whereabouts and harassment by the press.’<sup>73</sup> A similar injunction was granted in *Carr v News Group Newspapers*,<sup>74</sup> to protect a woman convicted of perverting the course of justice for providing a false alibi for her partner who had killed two children in 2002, in a case that had attracted massive publicity. In each case, the court was able to hear an application before any disclosure was made, but without a claimant notification requirement, this is by no means guaranteed in future similar cases.

Less extreme but still indicative of the attitude of the press, is the well known case of *Re S*.<sup>75</sup> This case arose in the course of a murder trial that had also attracted great publicity, in which a mother was accused of murdering one of her children. The Guardian of the brother of the murdered child sought an injunction preventing the press from revealing information that would identify him. This was on the basis that there was expert evidence to the effect that revelation of the child’s identity, exposing him publicity and to probable bullying and harassment at school, would be likely to cause him significant psychological harm and impair his recovery from the terrible experience he had been through.<sup>76</sup> he was already the subject of care proceedings and in a profoundly traumatised state. Nevertheless, three national newspapers intervened in the case, in order to argue that the order should be lifted, allowing them to reveal the mother’s, and thus the boy’s identity.<sup>77</sup>

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<sup>71</sup> *X (A woman formerly known as Mary Bell) v SO* [2003] EWHC 1101.

<sup>72</sup> [2003] EWHC 1101; [2003] EMLR 37.

<sup>73</sup> I. Leigh and R. Masterman, *Making Rights Real* (Hart, 2008), 284.

<sup>74</sup> *Carr v News Group Newspapers* [2005] EWHC 971 (QB).

<sup>75</sup> [2005] 1 AC 593.

<sup>76</sup> See Baroness Hale in *Campbell* [2004] 2 WLR 1232, [142].

<sup>77</sup> The intervention was successful in the Lords, which lifted the injunction, in a controversial decision: for critical comment, see H. Fenwick, ‘Judicial Reasoning in Clashing Rights Cases’, in H. Fenwick, G. Phillipson, and R. Masterman (eds), *Judicial Reasoning under the Human Rights Act* (Cambridge, CUP, 2007).

All these cases show that newspapers are quite prepared to publish information even where there is clear evidence that doing so may lead to a serious risk to a person's physical safety or their mental health, even (as in *Re S*) where that person is wholly innocent and vulnerable child. A notification requirement in English law would help ensure that the vital interests of such people, including their Convention rights to life and freedom from inhuman treatment, could be protected by a court by injunction, if it seemed necessary. The absence of any such requirement not only allows newspaper editors unilaterally to strip people of effective protection of their Article 8 rights, but also to put their very lives at risk.

*Buttressing the notification argument: journalistic contempt for Article 8 and the judiciary.*

As noted above, the Strasbourg court has repeatedly held that journalists are bound by the Convention to accept certain responsibilities, including a proper level of respect and consideration for the rights of others, in particular their rights to reputation and privacy, guaranteed by the Convention itself. However, it is painfully apparent that many prominent UK tabloid journalists are openly hostile, not only to the notion of the protection of privacy but also to the very judges who are seeking to ensure balanced protection for Article 8 under the UK's Human Rights Act. This is relevant, not only because it tends to negate any argument that the press can be relied upon itself to notify claimants in advance of stories, as an aspect of responsible journalism, but also because recent statements emanating from the tabloid media make plain that newspapers openly support their right to invade the privacy of others in order to ensure their economic survival. Paul Dacre is not only the editor of the best-selling middle market tabloid newspapers, *The Daily Mail*, he is also Chair of the Editor's Code Committee of the Press Complaints Commission, which has the role of setting standards for the print media on the obtaining and publishing of private information by newspapers and adjudicating upon complaints. Mr Dacre's attitude towards privacy is therefore of considerable importance. In a recent public lecture,<sup>78</sup> which attracted much publicity, he launched an outspoken and highly personal attack not only upon the development of a right to privacy in English law, but upon one particular High Court judge, Justice Eady, who has delivered more judgments in the

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<sup>78</sup> Speech by Paul Dacre at the Society of Editors conference, November 9 2008, available <http://image.guardian.co.uk/sys-files/Media/documents/2008/11/07/DacreSpeech.pdf>.

area than any other. His central (inaccurate) charge was that Justice Eady was single-handedly imposing upon the media a ‘backdoor’ law of privacy. It is not proposed here to point out the obvious, numerous flaws in Dacre’s argument,<sup>79</sup> but simply to highlight the relevance of his attack for the present discussion.

The speech is revealing firstly for the sheer animosity it displays by sections of the press towards the judges who are doing nothing more than developing a law of privacy in line with the jurisprudence of the Strasbourg court, as the Human Rights Act envisages. Mr Dacre said: ‘This law is not coming from Parliament...but from the arrogant and amoral judgements – words I use very deliberately – of one man’ – Justice Eady, whom he described as, a ‘judge with a subjective and highly relativist moral sense’. He added that, ‘The freedom of the press...is far too important to be left to the somewhat desiccated values of a single judge, who clearly has an animus against the popular press and the right of people to freedom of expression’, and he lamented the effect of the ‘wretched’ Human Rights Act. Mr Dacre’s views have been supported by other prominent tabloid editors: Rebekka Wade, editor of the best-selling *Sun* newspaper, said: ‘As a paper we agree with everything [Dacre] said. It is long overdue...’. <sup>80</sup> The *News of the World* itself responded to the *Mosley* judgment by claiming that the British media ‘is being strangled by stealth’ as a result of judges following ‘guidance from judges in Strasbourg who are unfriendly to freedom of expression.’<sup>81</sup>

Of direct relevance to the argument of this paper is the fact that Mr Dacre openly takes the view that it is for the press – not the courts – to decide when a person’s private life should be laid bare to the public, on the basis that some might take the view that what he or she had done, while perfectly legal, was contrary to their own standards of morality. Thus Mr Dacre argues:

From time immemorial public shaming has been a vital element in defending the parameters of what are considered acceptable standards of social behaviour, helping ensure that citizens...adhere to them for the good of the

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<sup>79</sup> See e.g. the comments of The Campaign for Press and Broadcasting Freedom in their Memorandum, [4.1]: SCCMS, Memoranda: Press Standards, Privacy and Libel (2008-09)).

<sup>80</sup> [www.guardian.co.uk/media/2008/nov/11/paul-dacre-daily-mail-privacy](http://www.guardian.co.uk/media/2008/nov/11/paul-dacre-daily-mail-privacy).

<sup>81</sup> See *Press Gazette*, 24 July 2008:  
[www.pressgazette.co.uk/story.asp?storycode=41787](http://www.pressgazette.co.uk/story.asp?storycode=41787).

greater community. For hundreds of years, the press has played a vital role in that process. It has the freedom to identify those who have offended public standards of decency...and hold the transgressors up to public condemnation.

Since it is clear that in modern pluralistic societies, there is huge variation in terms of moral standards on intimate matters of judgment such as sexual conduct, what the editor is asserting in effect is a right for newspaper editors to decide for themselves what conduct is immoral and so should be revealed to the public. Mr Dacre remarked that, ‘most people would consider [the sexual activities of Mosley] to be perverted, depraved, the very abrogation of civilised behaviour of which the law is supposed to be the safeguard.’<sup>82</sup> The point he misses of course, is that it is precisely in order to *avoid* the courts, as representatives of the state, having to make moral judgments about the private sexual behaviour of individuals that judges such as Eady J have begun to adopt a stance of moral neutrality in such cases (except of course in instances in which behaviour is revealed that might genuinely be thought to pertain to the public conduct of an important public servant).<sup>83</sup> Mr Dacre’s comments are revealing because they evince clearly his belief that privacy protection should be subject to the judgement of newspaper editors as to what is and is not immoral. Those holding such views are highly unlikely to give the subjects of their stories any chance to prevent them running: indeed they evidently regard themselves, rather than the courts, as being the proper judges of the boundary between private life and public scandal.

Finally there is a very clear admission in Mr Dacre’s speech that in his view, an important reason why newspapers should be free to cover sexual scandal is that such stories help to sell newspapers – and that, particularly in difficult economic times, newspapers need to be able to make money by selling the private lives of others. Thus Mr Dacre commented:

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<sup>82</sup> *Ibid.* While many would consider the use of prostitutes immoral, there was no evidence in this case that the prostitutes in question were exploited - in the sense of being forced in some way to carry out their occupation because of the need to pay for drug addiction, or a violent pimp. The evidence from the prostitutes themselves was that they regarded Mr Mosley as to an extent a friend and a fellow participant in the SnM ‘scene’, that money was not always involved and that they had planned to offer Mosley a free ‘session’ by way of a birthday present: *Mosley II*, [107].

<sup>83</sup> E.g. where it was alleged that he or she had promoted or otherwise improperly favoured a person with whom they were having a sexual relationship.

if mass-circulation newspapers, which, of course, also devote considerable space to reporting and analysis of public affairs, don't have the freedom to write about scandal, I doubt whether they will retain their mass circulations, with the obvious worrying implications for the democratic process.

Earlier in his speech, he referred to privacy law as 'undermining the ability of mass circulation newspapers to sell newspapers in an ever more difficult market.' These comments amount to a perhaps surprising admission that newspapers are directly motivated by commercial considerations when running stories concerning intimate aspects of private life: once again this suggests that editors are prepared to make the calculation that non-notification of a story, precluding any possibility of an injunction, is the best way to serve those commercial interests. It is true of course that newspapers are commercial entities and need to make a profit.<sup>84</sup> However, the Strasbourg jurisprudence envisages that journalists should carry on their vital role in society both with respect for the rights of others, including their rights to privacy, *and* with respect for the framework of law, particularly human rights law, within which they must carry on their business. Were this to represent the reality of the UK tabloid media, the notification requirement argued for here might not be necessary: what is striking about Mr Dacre's comments is that it indicates an outright rejection of respect for either the right to privacy or the courts. In such a climate, it is evident that the law must do more to compel such respect.

### **Objections to the notification requirement: a risk of stifling the press?**

#### *Interim injunctions and freedom of speech: general considerations*

In the author's view, the only real argument against some kind of 'notification requirement' is the fear that such a requirement would lead to interim injunctions being routinely deployed to stifle serious journalism, with courts unable properly to consider genuine public interest arguments advanced by the media in such cases. While it is accepted that this fear may have been justified prior to the inception of the

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<sup>84</sup> Indeed, Mr Dacre referred to judicial dicta which might be seen as supporting his argument on this point, namely the heavily criticised comments of Lord Woolf in *v B plc* [2002] 3 WLR 542, [11 (xii)], and dicta of Baroness Hale in *Campbell*, [143].

Human Rights Act 1998, it is submitted that the particular provisions relevant to interim relief introduced in that legislation, namely section 12, lay that fear to rest. The best known dicta from the Strasbourg court on interim injunctions is its observation that,

‘the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.’<sup>85</sup>

It may be noted first of all that the ‘perishability’ argument would not apply on facts like those in *Mosley* – a delay of a few months on such a story would not have made any difference to its newsworthiness. Indeed it should be noted that the argument is not a normative proposition but amounts only to a rather large generalisation about factual phenomena – that delay will often deprive a story of its value; as such it should generally be treated with caution and not assumed to apply in every case. Moreover, the Court has used the same language – stressing the need for ‘careful scrutiny’ - about any measures or sanctions ‘capable of discouraging the participation of the press in debates on matters of legitimate public concern.’<sup>86</sup>

There are, of course further well known arguments of principle against the use of prior restraints, mainly originating from the United States, in which they are presumptively unconstitutional. Barendt quotes Alexander Bickel’s well known adage, ‘[A] criminal statute chills, prior restraint freezes’,<sup>87</sup> noting that ‘an order not to publish material means that it can never legally see the light of day, while a publisher faced only by the prospect of a criminal prosecution may decide to take the risk and release the work’.<sup>88</sup> Or as the US Supreme Court has put it:<sup>89</sup> ‘A prior restraint has an immediate and irreversible sanction’. It is argued, in other words, that a prior restraint definitely punishes both author (by preventing her from speaking) and audience, by depriving them of the material in question. This analysis has been subject to sustained

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<sup>85</sup> *Observer and Guardian v UK* (1991) 14 EHRR 153, [60].

<sup>86</sup> *Times Newspapers Ltd (Nos 1 & 2) v UK*, 3002/03 and 23676/03 (10 March 2009), [41].

<sup>87</sup> *The Morality of Consent* (1975), 61.

<sup>88</sup> Barendt, n 10 above, 119.

<sup>89</sup> *Nebraska Press Association v. Stuart* 427 US 539, 559 (1976).

criticism,<sup>90</sup> in particular based on the lack of attention traditional US constitutional doctrine pays to the difference between a temporary judicial order and a system of censorship or perpetual restraints. This is not the place to re-rehearse these arguments. Rather, it may simply be noted that the above points apply only weakly to interim injunctions – the subject of this paper. If the newspaper wins at final trial then the material *will* be published and the speech rights of both audience and publisher will have been not denied but delayed only – perhaps only for a few months.<sup>91</sup> Indeed a delay in publishing a story such as Mosley’s would hurt a publisher less than a large award of damages, and, more importantly, in some ways, a huge costs order. Media organisations have voiced great concern to the Select Committee enquiry as to the effect of Conditional Fee Arrangements on costs orders made against media parties, and alleged concomitant pressure to settle cases considered legally defensible, due to the fear of massive liability in costs should the case be lost.<sup>92</sup> As one of the claimant lawyers pointed out to the Committee in oral evidence:

I think [a notification requirement] would also make an enormous difference in terms of the amount of follow-on litigation. All the lawyers here will make most of their money from litigating [after publication]... We do not make as much money from dealing with a story prior to publication...<sup>93</sup>

In other words, settling the issue at the interim stage is both quicker and far cheaper than proceeding to final trial to decide the issue in terms of damages. However, this of course depends upon how satisfactory is the test adopted at that stage.

### *Interim injunctions: the effect of section 12 HRA*

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<sup>90</sup> See Barendt, n 83 above and J. C. Jeffries, ‘Rethinking Prior Restraint’ (1983) 92 Yale Law Jo 409, 429 and his conclusion, 433: ‘In my view, a rule of special hostility to administrative pre-clearance is justified, but a rule of special hostility to injunctive relief is not’.

<sup>91</sup> In their Memorandum, Schillings contended that, with appropriate arrangements, ‘in many cases, a trial could be arranged to take place within a month or two of the initial injunction being granted. In many cases, the process could be even quicker’ (n 79 above).

<sup>92</sup> See e.g. the memo by Foot Anstey Solicitors: n 79 above.

<sup>93</sup> SCCMS HC 275-i, Q 84 (2008-09).

The test for injunctive relief in cases affecting freedom of expression contained in sections 12(1)-(3) HRA precisely require that such ‘careful scrutiny’ be afforded by the courts. As is well known, those provisions both ensure that injunctions against publication cannot generally be granted unless the media party has been contacted and given the chance to contest them and then go on to set out the substantive test in section 12(3):

‘No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.’

This replaced the old *American Cyanamid* test, which was that the applicant had, as a threshold test, to show that he or she had a ‘real prospect of success’ at final trial. If so, the court would consider where the ‘balance of convenience’ lay<sup>94</sup> between the case for granting an injunction and that of leaving the applicant to his or her remedy in damages. As Lord Nicholls observed in *Cream Holdings v. Banerjee*,<sup>95</sup> under this approach:

Orders imposing prior restraint on newspapers might readily be granted by the courts to preserve the status quo until trial whenever applicants claimed that a threatened publication would infringe their rights under article 8.<sup>96</sup>

In other words, the danger to the press under this test was that, once the applicant had made out an arguable case for confidentiality, the court was generally inclined to grant an interim injunction on the basis that if the story were to be published, the information would lose its confidential character, and there would be nothing to have a final trial about.<sup>97</sup> This consideration could be outweighed by the public interest defence at this stage, provided that the defence were supported by evidence and had a

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<sup>94</sup> *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

<sup>95</sup> [2004] 3 W.L.R. 918. This is the leading authority on s 12 HRA.

<sup>96</sup> *Ibid*, [15].

<sup>97</sup> See *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109; *Francome v Mirror Group Newspapers* [1984] 1 WLR 892, 900; *Lion Laboratories v. Evans* [1984] 1 QB 530, 551.

credible chance of success at final trial.<sup>98</sup> However, the pre-HRA test was considered potentially unfavourable to the media because in balancing the rights of the two parties, courts tended to take the view that while the plaintiff's right to confidentiality would be wholly defeated by publication, the press could always still publish the story if they won at final trial; they were thus inclined toward protecting the more fragile right of the plaintiff;<sup>99</sup> the risk thus was that the publication of important stories could be delayed even where the story was of serious public importance. As Lord Nicholls observed, 'Section 12(3) was enacted to allay these fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage.'

Lord Nicholls went on to confirm that section 12(3) had replaced the old approach with a much more demanding standard:

the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied that the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case...the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial.<sup>100</sup>

Thus, aside from in exceptional cases, where 'a lesser degree of likelihood may suffice as a prerequisite',<sup>101</sup> it is clear that the Human Rights Act has introduced a significant degree of extra protection for the press from interim injunctions. In order to decide whether the claimant is 'likely to succeed' at trial, the court at the interim stage must take a view of the merits, giving 'particular regard' to the freedom of expression of the newspaper and any public interest value of the publication.<sup>102</sup> Thus,

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<sup>98</sup> See *Lion Laboratories*, *ibid* 538, 548, 553; see also *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, where the public interest argument prevented the award of an injunction.

<sup>99</sup> See *A-G v Guardian Newspapers Ltd* [1987] 1 WLR 1248, 1292 and 1305.

<sup>100</sup> *Cream Holdings*, [22]

<sup>101</sup> Those in which it is necessary to make an interim order for a few days 'to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal'; also in instances where the injunction was sought to prevent a disclosure that could endanger the safety of the claimant (*ibid*).

<sup>102</sup> S 12(4) HRA.

‘the court should not grant an injunction against a defendant who raises a defence of public interest that has a real prospect of success.’<sup>103</sup> As the Court of Appeal has remarked, ‘a claimant seeking an interlocutory injunction restraining publication [now] has to satisfy a particularly high threshold test’.<sup>104</sup> Professor Leigh agrees: ‘the *American Cyanamid* test has been replaced by [a] more exacting standard.’<sup>105</sup>

Some of course will still contend that despite section 12, the courts will sometimes get it wrong and injunct a story that should be published. This possibility must be conceded. Very recently, for example, in *Barclays Bank Plc v Guardian News and Media Ltd*<sup>106</sup> Blake J continued emergency injunctions against the *Guardian* preventing it from publishing confidential documents alleged to show an elaborate tax avoidance scheme by Barclays bank at a time when such schemes were a matter of intense public debate. It is not possible to comment in detail on the judgment here,<sup>107</sup> but the decision clearly raises concerns about the use of interim injunctions to restrain stories of serious public interest. There were no competing Article 8 rights at stake and the documents plainly made a significant contribution to a very important story; moreover it was not clear that any real commercial damage would be done to Barclays through their publication. Nevertheless, it is submitted that if there is concern about courts being over-ready to use injunctions in such cases, the way to tackle this is not by allowing newspapers simply to bypass this possibility but to concentrate attention on improving judicial reasoning at the interim stage. It cannot be satisfactory that those who would plainly be entitled to an injunction to prevent a gross invasion of private life with little or no public interest justification should be denied the right even to *seek* such relief, because of a fear that sometimes the judges get it wrong. That would be the most imperfect kind of solution to the problem of the few doubtfully decided cases.

In addition to the specific provisions of the HRA, *Spycatcher* of course makes clear as a general principle that restrictions on freedom of expression must be necessary and proportionate. Since ‘even if a court is satisfied that victory for the claimant is likely, it still retains a discretion as to whether or not to order an

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<sup>103</sup> n 15 above, 55-56.

<sup>104</sup> *Douglas v Hello! Ltd* (No 3) [2006] QB 125, [258].

<sup>105</sup> Leigh and Masterman, n 73 above, 000.

<sup>106</sup> [2009] EWHC 591 (QB).

<sup>107</sup> At the time of writing, the judgment is not available.

injunction,<sup>108</sup> courts must, in exercising that discretion, consider whether granting an injunction is truly necessary. Thus courts will *always* consider whether the plaintiff can be adequately compensated through damages instead. While in cases concerning the revelation of private information, this is unlikely to be so, it allows a judge to examine carefully whether the plaintiff's claim really does require an injunction. For example, it may be suggested that where the objection to a photograph is not that it reveals information of an intimate character, but rather simply constitutes unwanted attention, albeit on an innocuous occasion – as in the JK Rowling litigation currently before the courts<sup>109</sup> – damages, rather than an injunction may be considered an adequate remedy. This discretionary element is thus a further safeguard against the over-ready granting of injunctions.

## Practical Objections

When confronted with the argument for a notification requirement, newspaper lawyers giving evidence to the Select Committee raised only the minor objection that it might sometimes be difficult to get hold of the subject of a story.<sup>110</sup> Plainly this should be recognised in any notification requirement introduced, such that only reasonable attempts at contact would be required: persons who make themselves deliberately un-contactable by the media should not be able to complain about a failure to contact them. But perhaps more important concerns are raised by the possibility of future developments in the area of 'misuse of private information'. It is well known that, on one view of the Strasbourg decision in *Von Hannover*, the publication of any unauthorised photograph of any individual in any location, other than of someone plainly going about public business (such as speaking at a press conference), gives rise to a *prima facie* claim under Article 8,<sup>111</sup> even if there is no harassment, humiliation or revelation of sensitive information. English law has not yet gone as far as this: no decision has yet imposed liability for the publication of such

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<sup>108</sup> n 15 above, 56.

<sup>109</sup> See *David Murray v Express Newspapers* [2007] EWHC 1908 (Ch) and [2008] EWCA Civ. 446.

<sup>110</sup> SCCMS, Oral evidence, HC 275-v, Q 336 (2008-09), Jeff Edwards, Chair of the Crime Reporters Association.

<sup>111</sup> For full analysis of the Strasbourg decision in this respect see H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (OUP, 2006), 000-000.

innocuous photographs: some well known dicta in *Campbell*<sup>112</sup> appeared to rule out liability in English law on such occasions in and Elton John failed when he brought such a claim.<sup>113</sup> The decision of the Court of Appeal in the JK Rowling case<sup>114</sup> comes closest to embracing such a position, but this was only a decision to allow the case to go to trial, and the court's reasoning seemed to turn mainly on the fact that a young child was involved. Nevertheless, the issue remains: should English law ever fully embrace the 'absolutist' *Von Hannover* position, then the notification requirement could become onerous indeed: on every occasion in which it was proposed to publish a photograph of an individual without consent (other than the narrow exception of their being on 'public business'), the person would have to be contacted in advance of publication, giving them sufficient time to apply for an injunction. Were this situation to be reached, it might be necessary to adapt the notification requirement so that it did not apply in every case, but only where the material would be seriously invasive of privacy, in the sense of revealing intimate or sensitive personal information about an individual (which could include publishing photographs of them in a nude or semi-nude state). It is in these kinds of situation that publication represents the irreversible loss of privacy that this paper has been discussing. At present, the revelation of information of this sort appears to be where English law sets the threshold for Article 8 to become engaged for domestic purposes.<sup>115</sup> In contrast, publication of an anodyne photograph of a person in a public place does not constitute such an irreversible loss; as suggested above, damages would be an adequate remedy and therefore notification in such cases should not be required. Thus, if English law *does* move to full acceptance of what has been described as *Von Hannover* in its 'most absolutist

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<sup>112</sup> *Campbell v. MGN Ltd* [2004] 2 AC 457, [154] (Baroness Hale) and [73] (Lord Hoffman).

<sup>113</sup> Elton John applied unsuccessfully for an injunction restraining the *Daily Mail* from publishing a photograph of the applicant which showed him standing in a London street, outside the gate to his home: *John v. Associated Newspapers Ltd* [2006] EWHC 1611 (QB); [2006] E.M.L.R. 27.

<sup>114</sup> [2008] EWCA Civ. 446.

<sup>115</sup> See e.g. the decision in *McKennit v Ash* [2006] EMLR 10 [2005] EWHC 3003 (QB); approved by the Court of Appeal ([2006] EWCA Civ 1714; [2007] EMLR 113), in which only liability for particularly sensitive revelations was imposed, while more mundane or anodyne revelations were seen as falling outside the scope of liability – see e.g. [139]. For discussion, see G. Phillipson, 'The Common Law, Privacy and the Convention' (n 79 above, 000).

form,<sup>116</sup> then a distinction of this sort might have to be introduced in relation to the notification requirement.

Finally, there is the practical issue of the specifics of how a notification rule could be introduced and enforced. This issue is for another day, but possibilities include an amendment to section 12(3) HRA, placing a duty upon editors to contact potential claimants prior to publication, or the introduction of such a provision into the Press Complaints Commission Code - which must be taken into account by the courts under section 12 HRA. Alternatively, it could be judicially introduced as a rule of common law. As for enforcement, one possibility would be a judicial ruling that the absence of such notification could, in appropriate circumstances, ground a right to exemplary damages, although this would require departure from the finding in *Mosley* that such damages are not available in privacy cases;<sup>117</sup> non-notification could alternatively be seen as a factor giving rise to increased aggravated damages, or perhaps simply to enhanced compensatory damages – although courts would have to be prepared to make major awards if such a rule was to have any deterrent effect; alternatively, a failure to notify could be punished by the awarding of indemnity costs.<sup>118</sup>

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<sup>116</sup> The phrase used by Platten J, quoting an unpublished conference paper of the author, in *Murray* [2007] EWHC 1908 (Ch), [64].

<sup>117</sup> See *Mosley II*, [172-211]

<sup>118</sup> As suggested by Schillings – above, n 79.

## Conclusion

This paper has argued that, given the very wide acceptance that an interim injunction will usually be the only satisfactory legal means of protecting privacy, it cannot be right that at present newspaper editors are in a position to deny the effective application of Article 8 at will, particularly when some of them are so plainly contemptuous of the values it protects and the judges who are seeking to apply it. It is not argued that such protection is required throughout Europe: in jurisdictions in which interim injunctions were too readily forthcoming, such a position might place press freedom in jeopardy. Conversely in states in which the media show a greater sense of responsibility in exercising their Article 10 rights, and greater respect for Article 8, such a rule might not be necessary. The UK now has a secure system under the Human Rights Act for ensuring that interim injunctions are only issued where they are a necessary restriction upon press freedom; unfortunately, it also has a tabloid press that openly declares its hostility to the European Convention and judicial protection of privacy and a very clear pattern of publishing grossly invasive stories. In such circumstances, it seems clear that the UK must provide a means whereby the protection provided by injunctions is, as a matter of practical reality, ‘prescribed by law’ and thus forestall the decisions of newspapers deliberately to strip from individuals the protection the Convention seeks to give them. Whatever mechanism was introduced to achieve this would answer to the particular circumstances of the UK; the aim would be to provide for UK citizens the possibility of the *effective* protection for their private life that was so plainly denied to Max Mosley.