EFFECTIVELY PROTECTING PRIVATE FACTS

Privacy and Confidentiality

This article examines the recent English litigation in the *Max Mosley* case before the domestic court and also before the European Court of Human Rights ("ECHR"). The article aims to highlight the problems in developing adequate remedial responses and includes discussion of the Neuberger Report on a possible duty to warn of an intended publication of private facts as well as recent English discussion of the appropriateness of super-injunctions given the principle of open justice. Whilst the article aims to set out an overview of recent English and ECHR developments, it concludes by trying to identify questions that Singapore law will meet in the area of privacy and personal facts. The Singapore government has already announced its intention to introduce data protection legislation in 2012. The legislation may well increase societal awareness of the importance of privacy in the Information Age. Whether it will or should trigger the development of new or expanded causes of action to protect private facts, out of the action to protect confidential information, remains to be seen.

George **WEI***
Dip Law (School of Oriental and African Studies),
LLM (University College of London);
Barrister (England and Hong Kong SAR),
Advocate and Solicitor (Singapore).

I. Introduction

1 The opening decade of the new millennium has witnessed considerable developments in several jurisdictions over the ability and willingness of the law to protect private facts. Leaving aside important statutory interventions (such as data protection legislation), the Judiciary in several common law jurisdictions has demonstrated renewed vigour in deepening the protection afforded to private facts. In

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the case of the UK, the impetus has been legislative: the Human Rights Act 1998[1] and the need for English law to comply with the European Convention for the Protection of Human Rights and Fundamental Freedoms.[2] In other cases such as Australia, the impetus has come from within the common law case law system: the evolution of new actions to better meet an individual's need for privacy.[3] How far the Australian courts are prepared to develop the action remains, however, to be seen. The problem with privacy is twofold. First, does the law recognise a substantive right of privacy or at least a right to respect for private (personal) facts? Second, if the law does confer a legal right to protect private facts, is the law able to provide an adequate but proportional remedial response in cases where interference is threatened or has already taken place? Recent English cases demonstrate the importance of interlocutory remedies in actions to protect privacy and the possible need to revisit the law on exemplary damages.

II. The backdrop: *Max Mosley* and the right to respect for privacy

2 The question as to when the law will impose a duty to provide information to a third party so that he/she can better protect his/her rights and interests has always been tricky. This is especially so where the

1 1998 c 42.

2 The European Convention for the Protection of Human Rights and Fundamental Freedoms was itself a response to the trauma of Nazism and World War 2.

3 *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; *Grosse v Purvis* (2003) Aust Torts Reports 81; *Jane Doe v ABC* [2007] VCC 281. Note, whilst there has been considerable excitement (in some cases disquiet) over case law development of an action to protect private facts – equity has long offered a fair degree of protection under the action for breach of confidence. See, for example, *Prince Albert v Strange* (1849) 1 H & W 21 1302; 1 Mac & G 25. For an earlier overview see G Wei, "Milky Way and Andromeda: Privacy, Confidentiality and Freedom of Expression" (2006) 18 SAcLJ 1. The author is grateful to an anonymous referee for the comment that part of the problem has always been defining privacy. Open-ended statements like "privacy protects personhood" or that privacy "includes the right to explore one's own character outside of public glare" whilst understandable raise considerable questions when used to craft legal rights and obligations. Leaving aside the evergreen article by S Warren & L Brandeis, "The Right to Privacy" (1890) 4 Harv L Rev 193, the body of literature on the subject is considerable and includes R Wacks, "The Poverty of Privacy" (1980) 96 LQR 73; R Wacks, *Privacy and Press Freedom* (Blackstone Press, 1995); R Wacks, "Why There Will Never be an English Common Law Privacy Tort" in *New Dimensions in Privacy Law – International and Comparative Perspectives* (A Kenyon & M Richardson eds) (Cambridge University Press, 2006); H Beverley-Smith, A Ohly & A Lucas-Schloetter, *Privacy, Property and Personality* (Cambridge University Press, 2005); Joshua Rozenberg, *Privacy and the Press* (Oxford University Press, 2004); and N W Barber, "A Right to Privacy" (2003) *Public Law* 602. The leading English practitioner's text is *Tugendhat and Christie's The Law of Privacy and the Media* (M Warby, N Moreham & I Christie eds) (Oxford, 2nd Ed, 2011). For a US commentary, see D Solove, *Understanding Privacy* (Harvard University Press, 2008).

question is addressed in respect of the "would be" wrongdoer. If the would-be victim is informed and consents or in some way encourages the wrongdoer to go ahead, defences based on consent or estoppel may arise. Assuming that the law does recognise a substantive right to protect private/personal facts, should the law impose a duty on a would-be publisher to pre-notify the victim of his/her intended publication so that the victim can take preventive action by seeking an injunction on an interlocutory and *quia timet* basis? Is it necessary to impose a duty to pre-notify and if so is such a duty workable in practice? This was in essence the heart of the recent complaint brought by Max Mosley against the UK government to the European Court of Human Rights ("ECHR") and which is discussed further below. Judges have from time to time noted that hard cases make bad law. By this what is usually meant is that a new liability or duty based rule, especially one of general application, may apply to situations far removed from the case at hand where the application will have undesirable consequences not relevant in the litigation generating the rule. There are many who argue from principle that in such cases it is for Parliament and not the courts to debate and craft new principles which have broad application. This is especially so where there is no clear societal consensus.

A. The Mosley *Case: Eady J*

3 The recent application by Max Mosley to the ECHR is one such case. The facts, unfortunately from Mosley's point of view, are well known. The claimant was (at the time) the President of the Federation Internationale de l'Automobile ("FIA") that organises the hugely successful Formula One motor racing competition. The claimant had been involved in sado-masochistic activities. A participant had secretly filmed the activities. She also gave an interview to the tabloid newspaper, the *News of the World*. On 30 March 2008, an article under the heading "F1 Boss has Sick Nazi Orgy with 5 Hookers" was published by the tabloid.[4]

4 Unsurprisingly, an action was commenced for breach of confidence and/or unauthorised disclosure of personal facts. An edited version of the video was uploaded to the tabloid's website. Between, 30 and 31 March, the edited video was viewed over 1.4 million times. The online version of article was visited some 400,000 times. On top of

4 There was a follow up article headed "Exclusive: Mosley Hooker Tells All: My Nazi Orgy with F1 Boss". The camera apparently had been supplied by the newspaper to the participant. It appears that there was a pre-existing relationship of confidentiality between the participants who had all known of each other for some time. The evidence was that the sado-masochistic community was a fairly tight-knit community and that it is an unwritten rule that none would reveal what had taken place: *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [4].

this, the print edition had a circulation of some three million plus copies. On 31 March, the newspaper removed the edited video footage voluntarily from its website. It undertook not to show the images again without giving 24 hours notice. On 6 April 2008, a second article was published. On 9 April 2008, Justice Eady declined an application for interim injunction to prevent repeat publication because the material was no longer private.[5] At trial, the claim was founded at least in part on "old fashioned" breach of an equitable duty of confidence arising out of a pre-existing relationship. In finding for the claimant, Eady J stressed that whilst the "old fashioned" action for breach of confidence derived historically from equitable principles, it had been extended by the stimulus of the UK Human Rights Act 1998 to protect information in respect of which there was a reasonable expectation of privacy (as opposed to information possessing the necessary quality of confidence).[6] Previous cases had already decided that once the claimant established a reasonable expectation of privacy that the court was required to carry out the next step of weighing the relevant competing Convention rights in the light of an intense focus upon the individual facts of each case.[7] Eady J accepted that in the case of photography, the very fact of clandestine recording may be regarded as an intrusion and an unacceptable infringement of the Art 8 rights. Once the recording was made, the appropriateness of onward publication either on a limited basis or more generally to the world at large was a separate issue.

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5 See *Case of Mosley v The United Kingdom* (Application No 48009/08) (10 May 2011) at [16], *per* the European Court of Human Rights that Eady J's view was that the dam had burst and anyone who wanted to see the video footage could easily do so. The edited video footage was restored to the *News of the World* website shortly afterwards. Note: the position may be different when the disclosures take place after the grant of a restraining order. See *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 and n 92 below.

6 Eady J explained in *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [7] that this was not simply a case of unaccountable judges running amok. Parliament itself had by enacting the Human Rights Act 1998 (c 42) (UK) placed an obligation on the courts to recognise Arts 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8 sets out the Convention right to respect for privacy. Article 10 sets out the Convention right of freedom of expression. The UK Human Rights Act 1998 requires development of English law in a manner consistent with these Convention rights.

7 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [10]: that it has to be accepted that any right of free expression as protected by Art 10 of the European Convention on Human Rights and Fundamental Freedoms 1958 whether on the part of the female confidant/participant or the journalists must no longer be regarded as trumping any privacy rights that may be established by the claimant. Eady J remarked that the requirement of an intense focus is incompatible with broad generalisations such as "public figures must expect to have less privacy" or "people in positions of responsibility must be seen as role models and set us all an example of how to live upstanding lives". The intense focus on the facts is part and parcel of a balance on the fulcrum of proportionality.

5 The defendant denied that Art 8 had been engaged on the facts. In any case, they asserted that the claimant's right under Art 8 was outweighed by a greater public interest in disclosure such that the defendant's right to freedom of expression under Art 10 should be allowed to prevail. The public interest as initially framed concerned the allegation that the sado-masochistic session in question involved Nazi or concentration camp role play. Later this broadened to include the assertion that the acts involved illegality: assault occasioning actual bodily harm and brothel keeping.[8] This was said to be of public interest because of the claimant's role as President of FIA. On the evidence, Eady J found that the sado-masochistic session did not involve any Nazi theme: that there was nothing spoken by the claimant on the occasion which reflected Nazi terminology or attitudes. Any "squeals" of a woman recorded by the covert filming was nothing other than "a spontaneous squeal by Woman A in *medias res*".[9] Not surprisingly, Eady J accepted that the claimant's Art 8 rights had been engaged.[10] The question that

8 The "brothel" argument was later abandoned.

9 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [70].

10 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [99]. There is a considerable body of jurisprudence in Strasbourg and elsewhere which recognises that sexual activity engages the rights protected by Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The fact that the activity might be repulsive to some does not mean that the right to respect for privacy is lost. Indeed, as Eady J pointed out at [118], even those who commit serious crimes do not necessarily become outlaws and lose all of their own rights, citing *Silver v UK* (1983) 5 EHRR 347 and *Polanski v Conde Nast Publications Ltd* [2005] 1 WLR 637. Also, note that in *Campbell v MGN Ltd* [2004] 2 AC 457, the claimant enjoyed an Art 8 right of privacy even though the information was connected with her drug taking and dependency. Eady J also at [117] referred to the prosecutorial discretion and the fact it would not be in the public interest to prosecute every crime however trivial. In Singapore, see the comments on prosecutorial discretion by Singapore's Attorney-General Sundaresh Menon in an interview with *The Straits Times*. The Singapore Attorney-General is reported as stating that "an integral part of every prosecutorial decision is consideration of the public interest" and that "the public interest connotes the fact that when a prosecutor makes a charging decision he or she is doing so in an expression of his or her assessment of what society's response to the crime that has been committed should be. This can be a very complex assessment. Among other things you have to be aware of what is happening in society to form some of these views". See *The Straits Times* (29 and 30 October 2011). Note that the English courts have on occasion felt it appropriate to draw a distinction between revelation of the details (by written description or photographs) and information relating to the bare facts of a relationship (sexual) between the claimant and some third party. See *Christopher Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808 where the information which the claimant sought to protect was said to fall within a very narrow compass. There was no question of intrusion into intimate matters internal to the claimant's extra-marital relationship. Even though the trial judge accepted that revelation of the bare fact of a familiar relationship might in some cases involve a low degree of intrusion that this had to be balanced in any case

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remained was whether there was a public interest such as to justify the intrusion in the name of Art 10. So far as the allegation of criminality was concerned, Eady J found that there was no criminality in terms of commission of sexual offences as all the acts were covered by consent.[11] So far as the allegation of public interest and the Nazi concentration camp theme was concerned, this also failed as the court found there was no such theme on the occasion in question.[12]

6 This left the defendant with the claim for Art 10 in the context of a "depravity" and "adultery" argument. Put bluntly, even if the claimant's acts could for the sake of argument be described as "depraved" and/or "adulterous" did it follow that these were therefore matters of public interest? On this, Eady J's view was that:[13]

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against other interests. The trial judge's conclusion was that in the circumstances of the case (which included that the claimant's first family were now aware of the second family) that there was no reasonable expectation of privacy. On appeal, the Court of Appeal held that the claim to a reasonable expectation was border line and that in any case the balancing exercise did not support the claim. See also *John Terry v Persons Unknown* [2010] EWHC 119 (QB) at [69] that a threat to publish intrusive details of the relationship or photographs was a different level of speech from disclosing the fact of the relationship and details which are at a low level of intrusiveness. Whether revelation of the bare fact of an extra-marital relationship is covered by a reasonable expectation of privacy or a public interest defence depends entirely on the circumstances of each case.

11 *R v Brown* [1994] 1 AC 212 distinguished. *Brown* concerned sado-masochistic activities of a much more serious nature (infliction of actual injury and pain). In such cases, consent was not a sufficient defence to a prosecution for assault occasioning actual bodily harm. Eady J on the other hand felt constrained to maintain some sense of reality and in any case noted that consent is a defence to common assault. But see also *Rio Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) and also *John Terry v Persons Unknown* [2010] EWHC 119 (QB) that the public interest is not confined to exposure of conduct which is illegal.

12 If there was such a theme, Eady J in *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [122] would have been inclined to find that Art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was engaged such as to support disclosure to those in the Federation Internationale de l'Automobile to whom the claimant was accountable. Query whether a wider disclosure (to the public at large) would have been justified.

13 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [125] ff referring also to *CC v AB* [2007] EMLR 11 at [25] that:

> [J]udges need to be wary about giving the impression that they are ventilating while affording or denying legal redress because of some personal moral or social views and especially at a time when society is less homogenous than in the past … a judge like anyone else is obviously entitled to hold personal moral views about the issues of the day but it is important not to let them intrude when interpreting and applying the law.

The reference to a rights based approach to privacy is interesting. It has been said that some Asian societies may take a different view as to whether a strong rights based approach is desirable in the area of privacy. In Europe, the European Ccourt of Human Rights has of late adopted a very strong approach to Art 8 of the European Convention for the Protection of Human Rights and Fundamental

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> [T]he modern approach to personal privacy and to sexual preferences and practices is different from that of past generations. First there is a greater willingness … to accord respect to an individual's right to conduct his or her personal life without state interference or condemnation. It has to be recognized that sexual conduct is a significant aspect of human life in respect of which people should be free to choose … It is important in *this new rights-based* jurisprudence to ensure that where breaches occur remedies are not refused because an individual journalist or judge finds the conduct distasteful or contrary to moral or religious teaching. [emphasis added]

7 In the UK rights-based environment of the Human Rights Act 1998 where Art 8 has been engaged, the only permitted exception is where there is a countervailing public interest which is strong enough in the circumstances to outweigh Art 8:[14]

> [W]as it necessary and proportionate for the intrusion to take place, for example in order to expose illegal activity or to prevent the public from being significantly misled by public claims hitherto made

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Freedoms as in *Von Hannover v Germany* (2005) 40 EHRR 1. The extension of private facts into routine personal activity occurring in public coupled with the holding that even the famous enjoy a right to private life suggests a deep underscoring of the Art 8 provision. Countries hoping to gain access to European databases of personal facts, *etc*, will need to be aware of the European approach.

14 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [131], *per* Eady J. For an example of a case where another English judge, Nicol J, found that the countervailing public interest was strong enough to override the claimant's right to respect for private facts, see *Rio Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB). An article was published by a newspaper (with a substantial readership of some four million) revealing details concerning a relationship between the claimant and a lady whilst the claimant was having a relationship with another lady who later became his wife. The newspaper did not contact the claimant in advance of the publication. The claimant was a well-known football player who was appointed in March 2008 as captain of the English football team. In finding for the newspaper, Nicol J accepted that public interest is not confined to exposure of conduct that is illegal and that whilst freedom to live as one chooses is one of the most valuable freedoms, so too is the freedom to criticise (within the limits of the law) the conduct of other members of society as being socially harmful or wrong. See also [65] that a facet of the public interest includes correcting a false image. In so holding, Nicol J acknowledged at [87] that the phrase "role model" was "ubiquitous". On the facts, Nicol J found at [84] that the claimant had "confessed past mistakes" and had publicly portrayed himself as reformed. He had also voluntarily assumed the role of England captain and at [89] that "it was a job that carried with it an expectation of high standards". Nicol J also referred to *A v B plc* [2003] QB 195 where Lord Woolf CJ found on the facts that footballers were role models and that undesirable behaviour on their part could set up an unfortunate example. That said, whether any football player (indeed any sportsman) is a role model must depend on the facts and in particular whether the sportsman has publicly claimed the role. For a case where no attempt was made to assert public interest to justify publication of an extra-marital relationship and a well-known football player, see *CTB v News Group Newspapers Ltd and Imogen Thomas* [2011] EWHC 1232 at [25], [2011] EWHC 1326, [2011] EWHC 1334.

> by the individual concerned … Or was it necessary because the information … would make a contribution to a debate of general interest? This is, of course, a very high test.

8 In deciding whether there was a counterbalancing public interest, a hugely important question concerned the extent to which the court should pay regard to the perception of the journalists and newspapers involved in the story. To what extent should the court have regard to the journalist's professional view as to the existence and scope of the public interest? What is the margin of appreciation (if any) that a journalist enjoys in deciding whether there is a public interest and if so the extent of information that should be disclosed? If the question is asked in respect of the threshold issue – is there a public interest that might justify the intrusion – then the answer must surely, at least at first sight, be a resounding "no". It is for the judge to decide whether there is a public interest such as to open the door to the intense focus on the circumstances in determining where the balance is to be held.[15] But, once the court has found that there is a real public interest, it may be necessary to afford some leeway for reasonable journalistic discretion in determining the details to be published. A margin for appreciation over the scope of the disclosure may well be necessary to vindicate the public interest (freedom of speech) at hand.

9 Cases such as *Campbell v MGN Ltd*[16] demonstrate that for any proven public interest that supports intrusion and disclosure, there may be a range of information which can be relevant. The judgment as to how much information it is necessary to disclose so as to meet the public interest and to lend credence to the story is doubtless one that is fraught with difficulty. Often times the journalist and newspaper will be writing and publishing under pressure of time. To mull, consult and delay may be to miss the opportunity altogether as when the public interest requires immediate disclosure. Where the threshold question as to whether there is a public interest that can justify the disclosure of private facts is answered affirmatively, freedom of expression and Art 10 may well require a degree of latitude to be accorded to the journalist in deciding how much information is to be disclosed to meet that public interest. If a "pound of flesh" approach is applied in every case, insufficient protection of freedom of expression may well result. It was

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15 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [139] and the comment of Donaldson MR in *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892 at 898 that the media were peculiarly vulnerable to confusing the public interest with their own interest. Compare this with the general views of Lord Woolf CJ in *A v B plc* [2003] QB 195 that freedom of the press was itself a matter of public interest. Does this mean that whatever sells copy for a newspaper must therefore be in the public interest? That with respect will be going much too far. See also *Rio Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) at [64].

16 [2004] 2 AC 457.

for this reason that Eady J observed that "it could be regarded as a matter of policy that allowance should be made for a decision reached which falls within a range of reasonable possible conclusions".[17] There is, with respect, much to be said for this approach. In some cases, the journalist and his editor will need to make a very quick decision as to what to include in a story on a matter of genuine public interest. There may be little time for forensic analysis of just what information precisely matches the width of the public interest relied upon. Not only is the journalist and news editor not able to "predict" with certainty how the court will define the public interest in issue, there will usually be a range of details that might be released to safeguard any proven public interest.

10 As Eady J comments, "it would seem odd if the only determining factor was the decision reached by the judge after leisurely debate and careful legal submission – luxuries not available to a hard pressed journalist as a story is breaking with deadlines to meet".[18] The principle of "responsible journalism" developed under English defamation law provided a useful analogy. Under defamation law, it is clear that whilst it is for the court alone to decide whether the story as a whole was a matter of public interest, there was scope for editorial judgment as to what details should be included in the story. If it is right to draw the analogy given the different interests protected by the "two very different torts", then Eady J states that:[19]

> … there may be a case for saying when public interest has to be considered in the field of privacy that a judge should enquire whether the relevant journalist's decision prior to publication was reached as a result of carrying out enquires and checks consistent with responsible journalism. In making a judgment about that and with the benefit of hindsight, a judge could no doubt have regard to considerations of that kind as well as to the broad principles set out in the PCC Code as reflecting acceptable practice.

11 Be that as it may, Eady J held that on the facts even if the public interest depended upon the reasonable judgment of the journalists concerned, that there was no basis for the public interest defence since no attempts had been made to verify the facts said to generate the public interest.[20] Once the English courts accept that journalists enjoy some

17 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [138].

18 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [139].

19 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [141].

20 For example, whilst Eady J accepts that the journalists, on what they had seen, thought there was a Nazi element, the belief was not arrived at:

> … by rational analysis of the material before them. Rather it was a precipitate conclusion that was reached in the round … The countervailing factors in particular the absence of an Nazi insignia were not considered … the judgment was made in a manner that could be characterized at least as casual and cavalier.

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latitude in determining the range and depth of information to be disclosed to meet the public interest, arguments are bound to resurface as to why the same should not be true when deciding whether and what public interest justifies the disclosure.[21] There is overlap after all between the questions: is there a public interest and has the journalist revealed too much information by reference to that public interest. That being so, there is some merit in the view that a test based on responsible journalism (reasonable care) should be adopted. This is especially so given the responsible journalism test applied by English law in defamation cases. The English court will be the arbiter as to whether reasonable care was taken by the journalist in determining the facts and the public interest said to be involved. In general, the more personally sensitive the information is (medical problems or sexuality for example), the greater the care that will be required. Whilst the court will pay regard to established journalistic practices and codes it should be free to hold in any particular case that adherence to the practice was unreasonable.

12 Having found a case for invasion of privacy, the question of remedies was considered at some length. Given that Mosley's right to respect for his private life had been unjustifiably interfered with, was the law able to craft an appropriate remedial response? Was there a remedy that could restore the claimant's right to respect or at least to compensate him for the injury (embarrassment, distress and loss of dignity) sustained? Given that in England, the action to protect private facts (arguably) remains an action in equity, to what extent could the court take account of the need for deterrence in assessing monetary compensation? Bearing in mind that the claimant had no opportunity to apply for interim injunctive relief pre-publication and given the fact

Max Mosley v News Group Newspapers Ltd [2008] EWHC 1777 at [170]. For extra-judicial comments on the importance of a balanced approach to privacy and freedom of expression, see the interview of Eady J by Joshua Rozenberg at <http://www.indexoncensorship.org/2011/06/mr-justice-eady-on-balancing-acts/> (accessed 1 June 2011).

21 See *Rio Ferdinand v MGN Ltd* [2011] EWHC 2454 at [64] (QB), *per* Nicol J that whilst the subjective perception of a journalist could not convert an issue into one of public interest if it is not, the court's objective assessment of whether there is a public interest in the publication must acknowledge that in a plural society there will be a range of views as to what matters or is of significance, in particular in terms of a person's suitability for a high profile position. See also *John Terry v Persons Unknown* [2010] EWHC 119 at [70] (QB), *per* Tugendhat J that the law was uncertain over the extent to which, if at all, the belief of a person threatening to make a publication in the media is relevant on the issue of public interest. Tugendhat J at [73] makes the valid point that the Data Protection Act 1998 (c 29) (UK) might apply to a newspaper publication and that the public interest defence set out in s 32 required the court to take account of the reasonable belief of the journalist. Tugendhat J, however, held that he could not decide the point without hearing arguments on the proposition.

that Eady J had declined to grant injunctive relief to restrain republication of the edited video tape (because the matters by then were already very well known and accessible on the Internet), what was the correct approach to take on the claim for damages?

B. Eady J and exemplary damages

13 To begin with there was the issue as to whether there was a power to award exemplary damages: an important matter given the difficulty in assessing compensatory awards for mental distress and anger *per se*. A number of reasons were relied on by Eady J in denying the power. First, the learned judge took the conventional view that exemplary damages were in any case anomalous in English law and should not be extended into a new area of law. This was especially because of the potential chilling effect of such awards on the right to freedom of expression set out in Art 10. Eady J was not satisfied that English law required in addition to the availability of compensatory damages and injunctive relief that the media be exposed to the "somewhat unpredictable risk of being fined on a quasi-criminal basis".[22]

14 Second, that the House of Lords in *Rookes v Barnard*[23] recognised two categories of claims whereby exemplary damages could be awarded: arbitrary and unconstitutional acts by public figures[24] and cases where there has been a deliberate and knowing commission of a tort[25] in circumstances such that the defendant could be said to have

22 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [173].

23 [1964] AC 1129. Eady J, whilst referring to the more recent case of *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122 (observations of Lord Nicholls that exemplary damages may be awarded where the conduct is merely outrageous), was not convinced that the time had come when the law on exemplary damages could be so broadly defined (*Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [180]).

24 Eady J noted in *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [177] that Lord Devlin in *Rookes v Barnard* [1964] AC 1129 was against extending this to comparable conduct by private individuals.

25 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [177], *per* Eady J. See also *English Private Law* (Burrows ed) (2nd Ed, 2007) at para 17.362 that:

> [T]he wrong breach of confidence is another excellent example that shows torts to be but a sub-category of the law of wrongdoing, which includes equitable wrongs. Breach of confidence historically arose at common law, it was nurtured and developed in the Courts of Equity and with its modern expansion to cover the territory of privacy has now been described by Lord Nicholls as a tort.

The quoted words occur in ch 17 which is entitled "Torts and Equitable Wrongs" written by James Edelman and John Davies. Edelman and Davies argue that defining a tort as a civil wrong which gives rise to damages other than one which is exclusively associated with breach of contract or breach of trust or other equitable

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calculated that there was more to be gained by the wrongful act than is likely to be suffered by paying compensatory damages. The action now described as infringement of privacy evolved recently from equitable doctrines that traditionally governed the protection of confidential information. The question according to Eady J is whether "it may now be correct to apply the label of tort to this expanded cause of action".[26] One view of the use of the tort label (especially that of Lord Nicholls in *Campbell v MGN Ltd*) is that the word was being "used advisedly to convey the message that infringements of privacy should now be regarded as an independent tort uncluttered by any limitations deriving from its equitable origins".[27] Given the confused state of the authorities on the basic nature of the action, Eady J concluded that:[28]

> [I]t can only be a matter for speculation whether a hypothetical future House of Lords would follow Lord Nicholls's classification of invasion of privacy as a tort and having done so would regard it as a wrong to which exemplary damages should now be extended.

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obligation is not adequate. The historical exclusion of equitable wrongs from consideration alongside torts is queried in the modern context. The authors argue that the law of confidence in particular has been pushing open the door and that a rational account of the law of civil wrongs cannot be confined to torts as overlaps can and do arise between torts and equitable wrongs. Does this mean that equitable wrongs or equitable torts are now to be treated in the same manner as common law torts: for example in the context of remedies, rules of remoteness and causation? That would be surprising. Perhaps the compromise will be to recognise the different pedigree of common law and equitable actions whilst accepting that since these are all part of the civil law of wrongdoings that the courts in developing equitable rules (such as remoteness) can and should have regard to comparable developments in the common law. See also Normann Witzleb, "Justifying Gain Based Remedies for Invasions of Privacy" (2009) *Oxford Journal of Legal Studies* 1 at 22 that there is now little to distinguish the action to protect private facts from tort.

26 The point being that as a tort, the action would be governed by general tort principles on causation, remoteness and availability of exemplary damages under the second category in *Rookes v Barnard* [1964] AC 1129. Eady J rightly pointed to the confusion in the terminology used for the action. Some of the leading judgments in the case law have applied the tort label to the action. These include: Lord Phillips in the Court of Appeal and Lord Nicholls in *Campbell v MGN Ltd* [2004] 2 AC 457. Then again, and this seems far more likely, the word tort was being used as a metaphor for the concept of a wrongdoing and does not mean that the action no longer lies in equity.

27 See *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [182], *per* Eady J. If Lord Nicholls had intended to signal that a tort had been born it would have been very helpful if there was clarification of the significance of the transformation. In any case, whilst the common law is not beyond child bearing, how does equity give birth to a common law action that is severed from its equitable roots? Classification of the claim (tort/equity) on conventional reasoning impacts the available remedies.

28 Or indeed the new UK Supreme Court (replacing the House of Lords late 2009)! *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [184]. Citing Cooke P in *Aquaculture Corp v New Zealand Green Mussel Co* [1990] 3 NZLR 299 that there was a jurisdiction to award exemplary damages for breach of confidence.

15 The next point was that there was and is no binding English authority that exemplary damages are available in actions for breach of confidence or privacy.[29] The discussion in *Kuddus v Chief Constable of Leicestershire Constabulary*[30] (House of Lords) about the desirability to move away from the "cause of action" test was made in the context of certain claims in tort such as negligence, deceit and breach of statutory duty. There was no suggestion by the House of Lords that any extended power to award exemplary damages would embrace actions for breach of confidence or any other equitable or restitutionary claim.[31] Finally, in the context of the balancing of rights enshrined in Arts 8 and 10, there was a need to address developments of the law by reference to standards of necessity and proportionality. That being so, Eady J doubted that the remedy of exemplary damages and punishment was either necessary or proportionate in carving out protection for Art 8 as balanced against Art 10.[32]

C. Eady J and compensatory damages

16 This left Eady J with one last matter: the assessment of compensatory damages in privacy cases.[33] Given the nature of the action and Art 8, Eady J rightly held that the damages may include distress, hurt feelings and loss of dignity.[34] On the facts, the scale of the distress and indignity was said to be "difficult to comprehend" and was probably "unprecedented". Compensatory damages were not just about distress

29 Lindsay J at first instance in *Douglas v Hello! Ltd* [2003] 3 All ER 996 in *dicta* did state that such awards might be possible. But in any event he made no such award.

30 [2002] AC 122.

31 The cause of action test refers to the approach that limits recovery of exemplary damages to those categories of torts in which exemplary damages were awardable pre-1964.

32 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [194], Eady J states that it is trite knowledge that exemplary damages are anomalous in civil litigation. The claimant made the reasonable comment that even so it would be anomalous if exemplary damages were available for defamation but not for breach of privacy. Both were tied by the values in Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. To this Eady J held that successful claims for exemplary damages in defamation were very rare. Maybe so but the point remains that if exemplary damages are awardable in defamation claims why should they not be awarded in suitable and rare cases in actions for privacy? Is the interest protected by defamation (reputation) so far removed from the interest protected by privacy (personality, autonomy and dignity)?

33 These were said to include an element of aggravation in appropriate cases.

34 Previous cases had pitched the award for mental distress at low levels. For example, in *Douglas v Hello! Ltd* [2005] 3 WLR 881 (CA), the award was £3,750 for each claimant for distress caused by the unauthorised publication of photographs. In *Campbell v MGN Ltd* [2004] 2 AC 457, the claimant received £2,500 for her distress and another £1,000 as aggravated damages for the strong attack that had been made on her for launching proceedings.

and hurt feelings: it was said that there was also a legitimate consideration of vindication to mark the infringement of a right. Recognition that damages served the function of compensation and vindication is significant. It supports the argument that an award of purely nominal damages would not provide an adequate remedy for the infringement of the right. As to be expected, reference was also made by the judge to defamation claims where awards could be very substantial as compared to awards for loss of amenity, pain and suffering.

17 In England, by way of comparison, the ceiling for personal injury cases was said to be in the order of £220,000 for injuries such as quadriplegia. On the other hand, an award of some £50,000 was likely appropriate for defamation and a moderately serious libel published in national newspapers. How is this to be compared to the fact that claims for loss of an eye usually result in lower awards? Comparison of compensatory awards for injuries across torts clearly has its limitations. Nevertheless, general principles still apply such as the rule that in assessing the award, aggravating factors can be taken into account such as where the defendant has "rubbed salt into the wound". Interesting questions also arose over causation. To what extent was the claimant the author of his own misfortune? Even though there is no doctrine of contributory negligence, Eady J accepted that problems of causation could arise (whether the action is in tort or equity).[35] As Eady J puts it: had the claimant put himself in a predicament by his own choice which contributed to his distress and loss of dignity? To what extent was he an author of his own misfortune? But on the facts little appears to have turned on this.[36]

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35 Applicable rules in equity for causation and remoteness are discussed elsewhere. See G Wei, "Breach of Confidence, Downstream Losses, Gains and Remedies" [2005] Sing JLS 20.

36 It is submitted that the facts will need to be rather unusual if a claimant is to be regarded as an author of his own distress simply because he engaged in sexual or private activities that others would find sensational or distasteful. After all, it is often said that privacy includes the right to explore one's own character and personality outside of public glare. Contributory negligence, even if a factor, merely reduces the award. Contrast illegality and gross immorality which may have the effect of denying a right to bring the claim. See also *Rio Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) at [59] that on the facts, even if the claimant's behaviour was reckless, this did not mean that he did not have a reasonable expectation of privacy. The claimant ultimately failed, not because his behaviour was reckless, but because a public interest justified the publication on the facts. In passing, Nicol J did comment that in *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777, Eady J said in terms that recklessness did not excuse the intrusion into privacy – but that this was in connection to the assessment of damages. Note that the issue as to the claimant's own fault can arise in two ways. First, it can have an impact on whether there is liability in the first place: does the claimant enjoy a reasonable expectation of privacy; the balancing exercise and query also whether a *volenti non-fit injuria* type defence might yet be developed. Second, it might also have an

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18 Could the court take account of deterrence in assessing compensatory awards? This is a tricky issue. If the action to protect private facts is one that has mutated (or is it evolved) into a tort, then there can only be a very limited role for deterrence as a factor in assessing compensatory damages. But if the action remains founded upon equitable notions of unconscionability, there may be a much better basis for factoring detriment into the assessment. After all, equitable obligations and their remedies (account of profits, equitable compensation, remedial constructive trust, *etc*) are sometimes said to be deterrent in nature.[37] Either way Eady J did not refer specifically to deterrence in calculating his award by way of affording an adequate financial remedy for the purpose of acknowledging the infringement and compensating to some extent the injury to feelings, the embarrassment and distress caused. That award was £60,000.[38]

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impact on remedies. Where the claimant has participated in the public airing of personal disputes with a third party – this can affect the court's view on the merits of the claim. See *Lennon v News Group Newspapers Ltd* [1978] FSR 573; and *Chris Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808 where, when considering where the balance lay on the facts, Gross LJ at [45] held, *inter alia*, that:

> [F]irst, I begin with a focus on the public interest in publication of the fact of Mr Hutcheson's second family. I have already referred to the very public dispute between Mr Ramsay and Mr Hutcheson, much ventilated to the media. To my mind, those who choose to conduct their quarrels in such a fashion take the risk that they may not be able to insist thereafter on clear boundary lines between what is public and what is private – regardless of whether they were hitherto only public personalities in a very limited sense.

37 But even so, as Eady J rightly pointed out in *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777, the chilling effect of inflated awards taking account of deterrence must be borne in mind in striving for a proportional and balanced response to Arts 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

38 Compare also Normann Witzleb, "Gain-Based Remedies for Invasions of Privacy" (2009) *Oxford Journal of Legal Studies* 1 at 28 that since privacy is especially susceptible to interference and the damage hard to repair, an injunction is naturally the primary remedy. But the problem of course is that in many cases the publication may have already occurred. In other cases, courts may be reluctant to grant interlocutory relief because of freedom of speech issues (especially in the context of s 12 of the Human Rights Act 1998 (c 42)). News reports at the time indicated that the claimant (Max Mosley) had commenced proceedings in the UK for libel. See, for example, http://www.guardian.co.uk/media/2009/apr/03/max-mosley-news-of-the-world (accessed 4 June 2009). If the claimant succeeds in the defamation claim it will be interesting to see if he is able to mount a successful claim for exemplary damages (these being available in appropriate cases in defamation actions, see *Cassell & Co Ltd v Broome* [1972] AC 1027). At the time of writing, a French court is expected to deliver its verdict in an action for defamation brought in France against News Group Newspapers in November 2011. Mention should also be made of the complaint brought by actress, Sienna Miller against paparazzi photographers for harassment (spatial privacy) as well as invasion of privacy. News reports state that the harassment action was in respect of "tailing" over a three/four month period resulting in the publication of some 23 photographs.

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III. The claim by Max Mosley before the ECHR

19 Even though Mosley won before the English domestic court, the victory was from his point of view pyrrhic in terms of the remedy. True he had been awarded £60,000 compensatory damages. Costs of £420,000 were also recovered. Mosley's complaint was that English law by limiting the award to compensatory damages had denied him an effective remedy to protect his right to respect for his privacy. Instead of appealing the decision on quantum or the refusal to award exemplary damages, the claimant decided to use this as the corner stone of his application to the ECHR. The remarks of Eady J that no amount of damages could fully compensate for the damage done coupled with the holding against exemplary damages formed the basis of the assertion that the claimant failed to receive an effective remedial response from the courts. The only remedy that would protect the right to respect for private life was an interim injunction to prevent the publication of the offending article in the first place. But this was only possible if the claimant had been forewarned of the impending publication. The defendant newspaper decided against this as they knew the claimant would have applied for and in most likelihood have obtained interlocutory relief.[39] The claim was that unless the UK amended its law so as to require the giving of a pre-publication notice, that the UK was in violation of Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[40] Because the key said to

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The harassment action was settled for £37,000. The privacy claim in respect of photographs taken of the actress on a boat in Italy was due for trial in January 2009. It has been reported that the matter was settled in late November 2008 for the sum of £16,000. In addition, an action against certain newspapers for invasion of privacy through publication of articles and images was settled at £35,000, see <http://www.guardian.co.uk/media/2008/nov/22/privacy-privacy> (accessed 30 May 2011).

39 Even though *Cream Holdings Ltd v Banerjee* [2004] UKHL 44 had established that a high threshold applied where freedom of expression and Art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was implicated, it was highly likely that an interim injunction would have been granted if Mosley had been able to make a timely application.

40 Note that by the time Mosley was aware of the publication and the possibility of republication it was too late. By then the material had been seen by thousands of people around the world and even if there was some gagging order the material would continue to be easily accessible on the Internet. In refusing the interlocutory injunction, Eady J stated that the court "should guard against slipping into and playing the role of King Canute". See the reference by the European Court of Human Rights (*Case of Mosley v The United Kingdom* (Application No 48009/08) (10 May 2011) at [34]). See also the discussion of the English position of interim relief in the light of s 12(1) of the Human Rights Act 1998 (c 42) at [46] ff. Note that the question as to whether a final injunction can be granted against a defendant whose very breach was responsible for putting information into the public domain is not without controversy. See *Speed Seal Properties Ltd v Paddington* [1986] 1 All ER 91 where a final injunction was granted even though

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unlock the door to the claim before the ECHR was the inadequacy of the English damages award, it will be useful to revisit the principles applied by Eady J in some further detail.

A. Why compensatory damages were inadequate

20 In awarding compensatory damages, it will be recalled that Eady J accepted that a gross violation had occurred and that the monetary award fell far short of providing compensation for the intrusion. The scale of distress and indignity was said to be "difficult to comprehend" and "probably unprecedented". How was the court to put a monetary figure on the distress and indignity so as to restore the lost right of privacy? In the case of defamation, it was said that reputation can be vindicated by damages in the sense that the claimant can be restored to the esteem in which he was previously held. This obviously had no relevance where the protected interest was the right to respect for a personal state of privacy. What are the goals of compensatory damages where a right to respect for privacy is the interest interfered with? First, there is the goal of providing vindication to the claimant for the right interfered with. A purely nominal award would be derisory and provide no vindication.[41] On the other hand, the extent to which any legal right could be vindicated by an award of damages must obviously depend also on the nature of the right interfered with. Reputational interests (defamation) are easier to vindicate by means of an award of monetary compensation than the loss of a state of privacy.[42] The award of damages does tell the world that the claimant's right to respect for privacy was interfered with. The court decision and award of damages cannot in any way restore the privacy lost.

21 Second, it did not follow that a purely nominal award was appropriate. Such an award would provide no *solatium* at all and indeed would likely have the reverse impact on the claimant. A notional award would mean that the claimant would have been better off not suing at

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the defendant by applying for a patent had thereby put the trade secret into the public domain. The injunction was granted on the basis that the equitable duty of confidence was not defeated by the defendant's own acts. Alternatively, the injunction was supported on the basis of preventing the defendant from benefiting from his wrong-doing. Whilst a similar view was expressed by several Law Lords in *AG v Guardian Newspapers Ltd* [1990] 1 AC 109, the better view is that of Lord Goff at p 291 that once information is in the public domain the confidence has been destroyed and there is no further basis for the injunction. An account of profits would prevent the defendant benefiting from his wrong-doing.

41 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at 216–220.

42 See also *John Terry v Persons Unknown* [2010] EWHC 119 (QB) and the remarks at [131] and [149] (ii) that where the action in privacy is in substance about protection of reputation with sponsors (sponsorship business) that damages would be an adequate remedy.

all to vindicate his rights. Given that Eady J accepted that the interference was severe (far from technical or borderline), it would be perverse if the claimant was awarded a sum that would leave him and future claimants feeling that it would be better not to rely on their legal rights.[43]

22 Third, there is the question of deterrence: to what extent (if any) does deterrence play a role in deciding the quantum of compensatory damages or equitable compensation? In tort actions, deterrence is usually thought to play only a subsidiary role. The fact that the claimant has won the action and will be awarded compensatory damages and costs is a deterrent in itself. Beyond this, is there any place in assessing the quantum of solace to include deterrence as a factor in the monetary figure to be awarded? The problem, as Eady J put it, is that damages paid to an individual for the purpose of deterring the defendant (or others) would "naturally be seen as an undeserved windfall". Maybe so, but that of course presumes that compensatory damages does not have a secondary objective of deterrence. If it does the windfall objection is of less relevance. Deterrence is not just about proactively protecting the claimant's rights. It is also about protecting the interests of the general public. But this only complicates the issue. The criminal law is usually seen as the main vehicle for deterrence. Crime and punishment should go hand in hand. Punishment whether by fine or imprisonment, *etc*, not only vindicates the victim's rights and provides a degree of closure (solace), it also serves the goal of deterring would be offenders by warning that crime does not pay.

23 These are well-known concerns. In the context of actions to protect privacy in Europe, an additional problem is the need to balance the Convention rights of privacy and freedom of expression. Given that the press and media are seen as playing an important if not vital role in safeguarding the public interest in freedom of expression/information, it was important that any award of damages was not so large as to have a chilling effect. Eady J rightly comments that if deterrence was to have any prospect of success, it would be necessary to take account of the means of the relevant defendant. Given the financial strength of many tabloid papers the award would have to be very large. If so, the award would fail the proportionality test "when seen as fulfilling a compensatory function".[44] That being so, Eady J was of the view that in assessing the quantum of compensatory damages judges should be reminded that they cannot achieve what is in its nature impossible. The

43 See M Tilbury, "Factors Inflating Damages Awards" in *Essay on Damages*, (P D Finn ed) (Lawbook Co, 1992) ch 5 at p 96. Tilbury makes the telling point that even in defamation actions the function of damages is only loosely to be called compensation and is really about vindication and *solatium*.

44 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [228].

claimant's state of privacy in respect of the wrongly revealed facts could never be restored. *Restitutio* was not available. If that result was "unpalatable", it could "not be mitigated by adding a few noughts to the number first thought of".[45] Instead, the court was to be guided by the need to select a figure which marks the fact that an unlawful intrusion had occurred, to afford a degree of *solatium* and which was not such as to be capable of interpretation as minimising the scale of the wrong done. Arbitrariness was "to be avoided at all costs". These guidelines whilst salutary are not easy to apply and the assessment remains highly judgmental. What for example does arbitrary mean when the court is assessing damages in a new area where there are few if any prior precedents. Arguments based on analogy from defamation awards only go so far given that the interests protected (whilst related) are different. A point recognised by Eady J. Even when the *Eady* guidelines are taken into account there is still room for a large margin of appreciation in deciding the final award. Why is £60,000 the appropriate award and not £100,000?

24 Leaving aside the need to balance competing Convention rights in determining whether deterrence has a role to play in assessing compensatory damages, there is also the question (already referred to) as to whether the action to protect private facts is rooted in tort or equity. Is the shoe-horned action to protect private facts now so far removed and different from the equitable action epitomised by *Coco v AN Clark*[46] that the time has come to recognise that a new action has developed (under the aegis of the Human Rights Act) to protect informational privacy?[47]

25 Fourth, there is the question as to the power of the court to award additional damages. The power to award additional or aggravated damages in tort is well established. Nevertheless, aggravated damages are still compensatory (at least in theory). They are awarded in cases where the defendant's conduct has rubbed salt into the wound as where he/she had behaved in a highhanded, malicious, insulting or oppressive manner

45 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [231].

46 [1969] RPC 41.

47 If a new action has developed, there may be a good case for saying that the action is in tort. The source of the tort is the statutory requirement in the Human Rights Act 1998 (c 42) (UK) requiring public authorities to act in a manner compatible with a Convention right. See s 6 of the Human Rights Act 1998. Public authority is defined in s 6(3)(a) as including a court or tribunal. On the other hand, if the action is truly still shoe horned into the equitable action for breach of confidence, it is hard to see how the conclusion that the action remains in equity can be avoided. In *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777, whilst Eady J canvassed the view that the action as developed out of "old fashioned breach of confidence" is derived from equitable principles accepted there was a developing view that the action was now best seen as lying in tort. See [7] and [181]–[183].

such as to justify the court in going to "the top of the bracket and awarding as damages the largest sum that could be fairly regarded as compensation".[48] But if a claim for aggravated damages is predicated on the conduct of the defendant during and after the commission of the tort, the point that must arise is whether the court should also take account of the claimant's own conduct so as to reduce any award. In short, is it relevant that the claimant could be said to have partially been the author of his own misfortune? This is not to say that there was consent. If there was, consent should in principle be a complete defence. Assuming for the sake of argument that the claimant had been careless as to the risk of intrusion or had conducted himself in a reckless manner; would this be a relevant factor in assessing damages? Eady J was of the view that, even though the doctrine of contributory negligence did not apply, the claimant's own conduct might in some cases have an impact on causation. Alternatively, Eady J felt that it could be said that "it is part and parcel of human dignity that one must take at least some responsibility for one's own actions".[49] In the end, it is difficult to know whether there was any discount on this ground since the learned judge did not indicate how much (if any) weight was attached to the point in coming to the award of £60,000. Nevertheless, the point is an important one: what are the applicable rules of causation and remoteness[50] in actions to protect private facts and to what extent is

48 See *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [222] citing Lord Reid in *Cassell v Broome* [1972] AC 1927. For discussion, see M Tilbury, "Factors Inflating Damages Awards" in *Essay on Damages* (P D Finn ed) (Lawbook Co, 1992) ch 5 at p 89.

49 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [226]. In the US, failure to take reasonable care has been cited as a factor in deciding whether a duty of confidence is imposed in cases of industrial espionage. W M Landes & R A Posner, *The Economic Structure of Intellectual Property Law* (Belknapp Press of Harvard University Press, 2003).

50 Suppose that as a result of disclosure of private and embarrassing facts the claimant is fired or loses out on some endorsement right, can compensatory damages be recovered for the consequential loss? If the claim is in equity, the author has argued elsewhere for a flexible approach that depends very much on the nature of the breach (G Wei, "Breach of Confidence, Downstream Losses, Gains and Remedies" [2005] Sing JLS 20. In *Douglas v Hello! Ltd (No 6)* [2003] EWHC 2629, Lindsay J in assessing damages for OK! Ltd on a lost sales basis initially applied a "but for" approach to causation. The "but for" test is not the only test for factual causation. Lindsay J at [48] continued that just because the losses would not have occurred but for the breach of confidence does not mean that a party is liable for such losses. Lindsay J went on to explain that in any event the losses were sufficiently consequential upon the breach and sufficiently foreseeable as to make Hello! Ltd liable for them in the ordinary way. This may be so, but query whether a test of remoteness based on reasonable foreseeability is more consistent with a tort approach? See also *John Terry v Persons Unknown* [2010] EWHC 119 (QB) at [131] and [149].

the claimant under a duty to take reasonable steps to mitigate the loss or injury?[51]

B. The claim for a mandatory duty to pre-notify

26 The Chamber judgment of the ECHR delivered on 10 May 2011 sets out a detailed analysis of English law and practice on the issue of a duty to pre-notify. A key point was that even though English law did not provide for mandatory pre-notification, the matter had not been swept under the carpet or ignored by relevant authorities. It had been considered at some length and there was in place a self-regulatory system and code of practice which encouraged pre-notification. These included the Press Complaints Commission[52] and the Editors' Code of Practice. For example, cl 1 of the Code provides that newspapers must take care to avoid publishing inaccurate or misleading or distorted information including photos. Clause 3 goes on to recognise that individuals have a right to respect for private life and that editors will have to justify non-consensual intrusions. It also states that it is unacceptable to take non-consensual photographs of individuals in a private place and that private places are public/private property where there is a reasonable expectation of privacy. These norms were, however, subject to the public interest. On prior notification, the Code states that:

> [T]here is wide agreement that prior notification … while often desirable, could not and should not be obligatory. It would be impractical, often unnecessary, impossible to achieve and could jeopardise legitimate investigations. Yet at the same time a failure to include relevant sides of the story can lead to inaccuracy and breach of the Code.

27 Not only had the newspaper industry considered at length the need for a compulsory duty to notify in advance of publication, the same was true of the English Parliament.[53] In February 2010, the House

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51 *Douglas v Hello! Ltd (No 6)* [2003] EWHC 2629. The claimants in an attempt to lessen the impact of the impending publication of the unauthorised photographs incurred costs and time to bring forward the publication of the authorised photographs of the wedding. Lindsay J held that from the perspective of OK! Ltd, the authorised (licensed) publisher, this was reasonable by way of mitigation or prospective mitigation of the losses from the unauthorised publication. OK! received an award of £6,450 for the extra costs incurred. A similar award was made to the Douglasses (£7,000).

52 The Press Complaints Commission is an independent body which examines complaints about the editorial content of newspapers, magazines and websites. If a critical ruling is made, the offending newspaper is bound to publish the ruling in full.

53 Reference was also made to international materials such as resolutions of the Parliamentary Assembly Council of Europe, the Committee of Ministers as well as the law and practice of Members States of the European Convention for the

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of Commons Culture, Media and Sport Committee issued a report which recognised that whilst editors contacted subjects prior to publication in the great majority of cases, a calculated risk was sometimes taken not to inform because they knew or suspected that an injunction against them was likely to be sought and obtained. The report states that "clearly pre-notification in the form of giving an opportunity to comment is the norm across the industry" and that "giving subjects of an article the opportunity to comment is often crucial to fair and balanced reporting". However, whilst the report recommends that the Editors' Code be amended to make clear that the norm is to pre-notify subject to a public interest exception, it was against a legal or unconditional requirement to pre-notify. Such a duty it was felt would be ineffective because of the need for a public interest exception. Instead, it was better to encourage journalists to pre-notify by allowing courts to take a failure to do so into account in assessing damages – as a factor in determining aggravated damages. The latter is an important point given Eady J's reluctance to take deterrence into account in assessing compensatory damages.

28 In the light of the above, the Chamber's unanimous view was against imposing a positive duty to establish a compulsory pre-notification system. The decision is clearly an important victory for newspapers and the media industry. The industry and its supporters argued against a legal duty on the basis of (a) the chilling effect of the claimed duty on freedom of expression/information; (b) the fact that the duty if crafted would be of general application and have consequences far beyond the narrow confines of the case at hand; (c) the difficulties in crafting the scope of the duty especially in the light of a public interest exception; and (d) the difficulties in enforcing the duty and the likelihood that newspapers and media would choose to pay the fine rather than to comply.[54] The victory, however, was not unqualified. The ECHR accepted that the publication of the articles, photographs and video images had a significant impact on Mosley's right to respect for his private life. Given Eady J's query as to whether

Protection of Human Rights and Fundamental Freedoms. What was significant was the finding that whilst many Members had non-binding codes of practice (including on the need for consent), there was no consensus or custom to make pre-notification mandatory. The significance of the latter being that it impacted on the margin of appreciation enjoyed by Member States to take an informed view on what was the best approach to be taken nationally on the issue.

54 See the third party submissions filed in *Case of Mosley v The United Kingdom* (Application No 48009/08) (10 May 2011): Guardian News and Media Ltd, the Media Lawyers Association and the Media Legal Defence Initiative, Index on Censorship, Media International Lawyers Association, European Publishers Council, the Mass Media Defence Centre, Roman Helsinki Committee, the Bulgarian Access to Information Programme ("AIP") Foundation, Global Witness and Media Law Resource Centre. The submissions are summarised in the Chamber judgment.

the claimant was to some extent the author of his own misfortune, the ECHR statement that the fact that Mosley chose to pursue a change in the law did not lessen any humiliation or injury is significant. Neither did the ECHR refer to the argument that Mosley had chosen to engage in risky behaviour as a factor minimising the severity of the intrusion.[55] Indeed, Eady J's expressed view was that:[56]

> [I]t would hardly be appropriate to clutter up the courts with cases of spanking between consenting adults taking place in private property without disturbing the neighbours. That would plainly not be in the public interest. It would not be logical … to pray in aid the public interest when trying to justify hidden cameras and worldwide coverage. It is worth remembering that even those who have committed serious crimes do not thereby become outlaws as far as their own rights including rights of personal privacy are concerned.

29 The ECHR whilst not expressly addressing this point underscored the principle that editorial discretion is not unbounded and that there was a distinction to be drawn between reporting controversial facts capable of contributing to a debate of general public interest and "making tawdry allegations about an individual's private life". Indeed, what will newspapers and the media make of the ECHR statement that "prior restraint may be more readily justified in cases

55 The point has already been made that an oft cited social justification for a strong right of respect for privacy is that it enables an individual to develop his/her personality and to conduct "experiments in living" outside of public glare. See N W Barber, "A Right to Privacy?" [2003] *Public Law* 602. This does not mean that everything done in private is therefore legal and outside of societal control. Taking drugs in private is no defence! Murder done in private is still murder – even if the victim consents! See *R v Brown* [1994] 1 AC 212. Consent is no defence to criminal assault in the case of extreme sado-masochistic activity. In Germany, see, however, the case of Armin Meiwes – is it murder to kill and eat a human being when the victim fully consented to the acts in advance? See <http://edition.cnn.com/2004/LAW/01/13/findlaw.analysis.leavitt.cannibalism/index.html> (accessed 1 May 2011). Consent may be a defence in the common law to less serious cases of assault. On the facts of *Mosley*, the activities were said to be of an altogether different order. The European Court of Human Rights had in *Laskey, Jaggard and Brown v UK* (1997) 24 EHRR 39 held that considerations relevant to the criminalisation of such activities was the potential impact on health and whether very young people were being victimised or corrupted. See also *Rio Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) and also *John Terry v Persons Unknown* [2010] EWHC 119 (QB) that it is not the case that the public interest is confined to exposure of conduct which is illegal.

56 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [117]. But note the importance of a balanced approach based on a careful scrutiny of the facts. See n 55 above and the observation that a public interest may exist to support revelation of facts even when the claimant has not been involved in illegal activity. The fact that the claimant's conduct is not in itself illegal is just one factor (albeit an important one) in deciding where the public interest lies where Arts 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms are engaged.

which demonstrate no pressing need for immediate publication and in which there is no obvious contribution to a debate of general public interest". The ECHR also accepted that no award of damages after disclosure of impugned material could afford a remedy in respect of the specific complaint brought by Mosley against the UK, *viz*, that there is no duty to pre-notify. This was the reason why the ECHR accepted that Mosley remained a victim of the intrusion even though he had recovered costs and damages. Even if Mosley had advanced claims for an account of profits or had appealed the finding against exemplary damages this would have made no difference to his complaint that English law had failed him by not providing a pre-notification right. At the very least, the ECHR had no doubt that Mosley had the *locus standi* to bring the complaint against UK government as a victim of an alleged breach. The tricky question was whether there was a sufficient basis for ruling in favour of a mandatory pre-notification requirement where there were reasonable grounds to believe that the publication would infringe the right to respect for private life having regard to all the circumstances including any public interest defence and the practicality of the order.

30 If the pre-notification order sought had been limited to cases of highly personal intimate facts such as those in the *Mosley* case, the ECHR may well have been inclined to accede to the claimant's argument. After all, the ECHR accepted that there had been a flagrant unjustified interference with the claimant's privacy. A critical factor was that the order sought was of general application – relating to the framework for balancing rights of privacy and freedom of expression in the domestic legal order. The duty if imposed would apply in all cases where the publication might reasonably be seen as interfering with the subject's right to respect for private life. Private life, as case law has demonstrated, is an elastic concept covering medical information, sexual information and a whole range of other personhood matters including shopping.[57] The situations covered range from highly intimate facts all the way through to the mundane and ordinary. Just as elastic is the notion of public interest justifying intrusions. These range from cases of extreme criminal misconduct such as threatened acts of terror all the way through to vague protestations of hypocrisy and a variety of claims based on "role model" type of arguments.[58] In all cases, the

57 In Europe see *Von Hannover v Germany* [2004] EMLR 21 (cycling, shopping and dining out). In the UK see *David Murray v Express Newspapers plc and Big Pictures (UK) Ltd* [2008] EWCA Civ 446 (family shopping trip in the High Street).

58 In the UK see *Woodward v Hutchins* [1977] 2 All ER 751 at 754, *per* Lord Denning MR (well-known pop stars):

> There is no doubt that this pop group sought publicity. They wanted to have themselves presented to the public in a favourable light … Mr Hutchins was engaged so as to produce, or to help produce, this favourable image, not only

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newspaper would have to consider whether there was a reasonable basis for the subject complaining that his private life was interfered with and if so whether the public interest relieved the newspaper from the duty to warn. No easy task. In other cases, the newspaper might not know the identity of affected subjects such as in the case of photographs taken in the street of unknown persons. Indeed, the Media Legal Defence Initiative, which had intervened in the proceedings, argued that the duty could delay publication of important news which itself is a perishable commodity and that the duty at best should be limited to cases of medical records and photographs taken without consent in private places. Whilst the ECHR reaffirmed that states enjoyed a margin of appreciation over choice of measures, this was subject to European supervision. Factors determining the scope of the margin included whether the interference was a serious interference with an aspect of a person's identity – in which case the margin narrowed. The same was true where the activity at stake involved a most intimate aspect of private life. Ultimately, the ECHR decided against the claimant for several reasons.

(a) First, the absence of any European consensus meant that the margin of appreciation was broader.

(b) Second, this was not a case where there were no measures in place to protect Art 8.

(c) Third, industry self-regulatory steps aside, violations of Art 8 would result in damages.

(d) Fourth, the ECHR was not satisfied with the effectiveness of the pre-notification duty sought. Any duty had to be subject to a public interest exception. To avoid a chilling effect on freedom of speech, a *reasonable belief* by the newspaper as to the public interest would have to be enough to justify non-notification. On the facts, it was likely that even if there was a pre-notification duty the newspaper would have chosen

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of their public lives but of their private lives also. If a group of this kind seek publicity which is to their advantage it seems to me that they cannot complain if a servant … discloses the truth about the. If the image which they fostered is not a true image, it is in the public interest that it should be corrected.

See also Bridge LJ at 755 that "it seems to that those who seek and welcome publicity of every kind bearing on their private lives so long as it shows them in a favourable light are in no position to complain of an invasion of their privacy by publicity which shows them in an unfavourable light". See also *Campbell v MGN Ltd* [2004] UKHL 22 (well-known model and assertions that she did not take narcotics) and compare *Rio Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) (football players) at n 14 above.

not to notify on the basis that it reasonably felt there was a public interest exception.[59]

(e) Fifth, there was the question as to whether there could be an effective sanction for non-compliance. A regulatory or civil fine unless set at a punitive level would be ineffective. Anything less would simply lead to the newspaper taking the risk and paying the *ex post facto* fine.

(f) Sixth, while the ECHR had on occasion required more than damages in order to satisfy the positive duty under Art 8 – these are cases where the violation was of especial importance as for example the need for criminal sanctions in the case of rape of a 16-year-old mentally handicapped girl (especially vulnerable claimants).[60]

Given that Eady J accepted that compensatory damages could never restore Mosley's state of privacy, it is significant that the ECHR held that such awards can reasonably be expected to have a salutary effect on journalistic practices and that the ECHR implicitly accepted that *ex post facto* damages could provide an adequate remedy for violation of Art 8.[61] It is unlikely that the ECHR was expressing the view that the award of £60,000 was adequate to restore Mosley's state of privacy.

59 But see *Rio Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB). The publication complained of in this case (25 April 2010) occurred before the decision of the European Court of Human Rights in *Case of Mosley v The United Kingdom* (Application No 48009/08) (10 May 2011). The defendant newspaper did not contact the claimant about the proposed article in advance of publication. The claimant asserted that if he had the opportunity that he would have applied for an injunction. Nicol J at [26] commented that notwithstanding the decision of the European Court of Human Rights that it "was striking that the defendant had not done so in this case although that would be common practice in the media industry". Nevertheless, Nicol J found for the defendant (on public interest and the balancing of Arts 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) and that the lack of prior notice was a "red herring" at least so far as an assessment of where the balance between the competing rights lay. Even the defendant's internal assessment of their merits at some earlier stage was said "to be neither here nor there".

60 Vulnerable claimants aside, the European Court of Human Rights held that it was satisfied that the threat of criminal sanctions or punitive fines would create a chilling effect which would be felt in the spheres of political reporting and investigative journalism – both of which were said to attract a high level of protection under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

61 The award, however, must be proportional to the seriousness of the privacy violation. An award of a "derisory" sum would not be compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Armoniene v Lithuania* (Application No 36919/02) (25 November 2008) and cited by the European Court of Human Rights in *Case of Mosley v The United Kingdom* (Application No 48009/08) (10 May 2011).

Rather, it was stating that the award was adequate by way of vindication of the infringed right and provision of *solatium*.

IV. Where to now: Remedies and righting the wrong?

31 Shortly after the decision of the ECHR, Mosley announced his intention to refer the decision to the 17 member Grand Chamber of the ECHR for further consideration. In September 2011, it was announced that the Grand Chamber decided to refuse the application for reconsideration with the result that the Chamber judgment became final on 15 September 2011.[62] The result is that the newspaper and media industry has won a significant victory in Europe in the Mosley case. Even though the ECHR was satisfied that the conduct of the newspaper was open to "severe criticism" and that there had been a flagrant breach of privacy resulting in substantial humiliation and distress, the claimant failed in his bid to write a mandatory pre-notification requirement into Convention law. If he had succeeded, it would be an interesting question as to whether the UK government would have been able to introduce the necessary statutory measures to implement the ECHR decision.[63]

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62 In a statement, Mosley stated:

> The decision of the ECtHR in May this year, which is now final, was made at a time when every British newspaper was attacking privacy law. Only now are we beginning to understand the extent to which personal privacy was routinely invaded by the News of the World and the consequences of such behaviour. My view remains that the requirement of prior notification is inanswerable. I am hopeful that the UK Government by way of various committees and inquiries can find a regime for effective safeguards for personal privacy. This is certainly not the end of the road.

See the press release issued by Mosley's solicitors on 26 September 2011. The inquiries referred to are (a) the Joint Committee on Privacy and Injunctions, UK Houses of Parliament and (b) the Leveson Inquiry into the culture, practice and ethics of the press. See n 69 below for references to the Joint Committee. The Leveson Inquiry was set up in the UK in the wake of the phone hacking scandal that led to the closure of the *News of the World*. The terms of reference can be found at <http://www.levesoninquiry.org.uk/> (accessed 1 February 2012).

63 The "victory" in *Case of Mosley v The United Kingdom* (Application No 48009/08) (10 May 2011) comes fast on the back of another victory for the newspaper and media industry in *Case of MGN Ltd v The United Kingdom* (Application No 39401/04) (18 January 2011). In that case, the European Court of Human Rights held that an award of success-based costs was disproportionate and could affect the balance to be struck between competing Convention rights of privacy and freedom of expression. Space constraints do not permit a fuller discussion of this important decision. In the UK, success-based costs were criticised by the Jackson Review (Ministry of Justice January 2010). In Singapore, contingency/success based fees have not been approved although there were signs (at one stage) of a softening of attitudes. See the Singapore Legal System at <http://www.singaporelaw.sg/content/LegalSyst.html> (accessed 1 February 2012). See Legal Profession Act (Cap 161,

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A. What next: Exemplary damages revisited

32 Will the English and other common law courts permit claims for punitive damages in appropriate cases where the invasion of privacy was deliberate and calculated to result in a gain that exceeds any damages that might be awarded?[64] Whilst Eady J in the *Mosley* case was very much against such a power, it is noted that another English High Court judge, Mr Justice Lindsay was minded to move in the direction of the power. In *Douglas v Hello! Ltd (No 5)*,[65] Lindsay J was of the view that in light of the House of Lords decision in *Kuddus v Chief Constable of Leicestershire Constabulary*,[66] there were three key considerations (assuming but not deciding that exemplary damages were available in equity):[67]

> The first is that the question whether or not to award exemplary damages should be determined more by reference to the behaviour

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2009 Rev Ed) s 107. But note that Chan Sek Keong CJ at the opening of the legal year in 2008 did state that:

> [I]n this connection, the introduction of a conditional fee regime, as distinguished from a pure contingency fee regime should provide greater access to justice. Hence, I support the recommendation of the Committee to Develop the Singapore Legal Sector, chaired by Judge of Appeal V K Rajah, to implement such a scheme.

64 Of course, even if there is such a power, exemplary damages should rarely be awarded. If the claim is seen as one in tort, it may be easier to persuade that in the light of *Kuddus v Chief Constable of Leicestershire* [2002] AC 122 exemplary damages can be awarded. If the claim is categorised as equitable then the question whether equity can develop a jurisdiction to award exemplary damages is not beyond argument. New Zealand case law suggests that this may be so: *Aquaculture v New Zealand Green Mussel Co (No 2)* [1987] 10 IPR 319. Indeed, there is New Zealand and Canadian case authority for the view that the time has come to move away from the divide between remedies and common law and equitable actions. Indeed, in *Aquaculture*, Cooke P states that:

> [F]or all purposes now material equity and common law are mingled or have merged. The practical reality of the matter is that in the circumstances of the dealings between the parties the law imposes an obligation of confidence. For its breach a full range of remedies should be available as appropriate no matter whether they originated in the common law, equity or statute.

In Canada, see Sopinka J in *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 that the multifaceted jurisdictional basis supporting the claim is relevant in determining the appropriate remedy and that the court is provided with considerable flexibility in fashioning a remedy. See also J D Davies, "Duties of Confidence and Loyalty" [1990] LMCLQ 460 and compare P Birks, "The Remedies for an Abuse of Confidential Information" [1990] LMCLQ 460.

65 [2003] EWHC 786 (Ch D).

66 [2002] AC 122. This case concerned a claim against a police officer (misfeasance in public office). The House of Lords did not consider the issue of exemplary damages in equity.

67 *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] AC 122at [272]. On the facts, the court held that exemplary damages were not in any case appropriate as it was not possible to describe the defendant's conduct as being outrageous.

> complained of than by reference to the nature of the cause of action to which that behaviour has given rise. The second, is that a powerful case can be made that such damages should be considered where, and perhaps only where, the behaviour complained of gives rise to a sense of outrage. The third is that a recognised category in which such damages may be awarded is where damages on an ordinary compensatory basis can be seen not to be sufficient to do justice … the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable.

33 In light of the recent decisions of the ECHR in *MGN* and *Mosley*, it is unlikely that the English courts will be in any hurry to expand the cases where exemplary damages can be obtained under English law particularly in those areas which raise conflicting Convention rights. The *Mosley* Chamber decision in particular stresses the importance of ensuring that Convention law remedies did not have a chilling effect on freedom of speech. It will be recalled that the ECHR has taken the view that compensatory damages were an adequate response to interference with the right of privacy save in those cases where the claimant was especially vulnerable and deserving of protection as in the case of young children. Regulatory or civil penalties in the context of breach of any duty to pre-notify would have to be set at punitive levels if they were to be effective. This was an important reason why the ECHR rejected the *Mosley* claim. That being so it would be inconsistent if the English courts developed a general jurisdiction to award punitive damages for interferences with the right of privacy. The position in other common law jurisdictions not affected by the ECHR could be different. Singapore, for example, does not have a direct equivalent to the UK Human Rights Act. It is not bound in any way by the ECHR jurisprudence. Doubtless Singapore will be generally cognisant of international developments but will be free to develop her law of privacy and remedies according to domestic law and principles. This does not mean that Singapore courts must or should accept a jurisdiction to award exemplary damages in cases such as *Mosley*. On the other hand, it makes sense that the decision as to whether such a jurisdiction exists should not depend on how the action is classified: tort or equity. If Singapore courts, like their common law counterparts in New Zealand and Australia, develop an action to protect private facts out of the action in equity to protect confidential information/relationships, it seems less relevant today to make so much depend on whether the action is in tort or an equitable wrong.

B. Account of profits revisited

34 Questions are also bound to arise over the availability of gain-based remedies – an account of profits in actions in respect of unauthorised use of non-commercial confidential or private information.

In a case where the claimant's action is founded on unauthorised use of private information in circumstances where it is hard to assess losses (direct or consequential), strong arguments appear to exist to support the award of an account of profits.[68] Indeed, if the action to protect private/confidential facts remains true to its equitable origins, it is hard to see why the claimant should be denied a right to elect for an account in preference to compensatory damages. In some (possibly many) cases, the claimant may prefer damages as where the taking of an account is difficult, impractical or requires a complex investigation to apportion profits arising from the interference and profits otherwise arising. Nevertheless, there seems to be no reason why an account of profits should not be one of the discretionary remedies available. In many cases, the discretion will depend almost entirely on the election of the claimant. In other cases, where there is a parallel valid contractual obligation, it may be that the court will limit the claimant to damages unless the circumstances are extraordinary.

C. Interim injunctions, super-injunctions et al*: The Neuberger Report*

35 Considerable discussion of interim remedies has taken place in the UK in the context of privacy actions.[69] This is hardly surprising.

68 See the excellent discussion by Normann Witzleb, "Justifying Gain-Based Remedies for Invasions of Privacy" (2009) *Oxford Journal of Legal Studies* 1. Witzleb points out that there is supporting *dicta* to be found – *per* Lord Keith in *AG v Guardian Newspapers Ltd* [1990] 1 AC 109. Witzleb also argues that the extension of account of profits to appropriate cases of breach of contract also supports the view that there is no point (at least in this context) of perpetuating the divide between remedies for breaches of equitable and contractual duties of confidence, citing *AG v Blake* [2001] 1 AC 268. But see now *Vercroe v Rutland Fund Management Ltd* [2010] EWHC 424 that an account of profits should not ordinarily be awarded if the breach is of a contractual duty of confidence. See Sales J citing *AG v George Blake* [2001] 1 AC 268. A different view is that *Blake* which concerned breach of contractual duties illustrates the extent to which the court had to go to craft a remedy for the Crown (account of profits) given that exemplary damages were not available for the contractual breach. *Blake* does not hold that where there is an equitable duty of confidence running alongside the contractual obligation that an account of profits should only be awarded for the breach of the equitable duty in the extraordinary circumstances outlined in *Blake*. The award of an account being an equitable remedy is discretionary but this does not mean that it must be confined to wholly exceptional cases where the breach of equitable duty is mirrored by a contractual duty. See also Peter Devonshire, "Damages and the Betrayal of Commercial Confidence" (2010) 126 LQR 526.

69 See <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf> (accessed 1 May 2011). The conclusions of the Neuberger Report, whilst welcomed in some quarters, has already attracted strong criticism. See, for example, the comment of the *Daily Mail Online* (21 May 2011) under the headline: "Judges and a Dark Day for Open Justice" <http://www.dailymail.co.uk/debate/article-1389368/Super-injunctions-Judges-dark-day-open-justice.html>

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Confidential information and private facts possess value (monetary and personal) precisely because of secrecy. The trenchant remark of Sir John Donaldson MR in *AG v Newspaper Publishing plc*,[70] bears repeating:

> If the parties are arguing about the ownership of a horse … it may not matter who keeps the horse … pending trial … Not so with confidential information … If pending the trial, the court prohibits publication, the information can still be published after the trial if the defendant succeeds. But, if, pending the trial, the court allows publication, there is no point having the trial since the cloak of confidentiality can never be restored. Confidential information is like an ice cube. Give it to a party who has a refrigerator and you still have an ice cube by the time the matter comes to trial … Give it to the party who has no refrigerator or will not agree to keep it in one and by the time of trial you just have a pool of water which neither party wants. It is the inherently perishable nature of confidential information which gives rise to unique problems.

36 If the perishable nature of confidential information has given rise to special problems in the case of commercial secrets, the problems that can arise in the context of official and personal secrets is worse. On the one hand, the perishable nature of such information is greater. The revelation of the fact that legal proceedings have commenced which involve personally sensitive information such as sexual preferences can cause considerable harm even if the details are withheld under the terms of an interim injunction. But, on the other hand, the public interest in freedom of speech and information is likely to be near the sharp edge in

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(accessed 24 May 2011). As will be seen, the Neuberger Report, whilst recommending tight control over the grant and terms of super-injunctions and anonymisation orders, did accept that these were sometimes necessary to ensure substantive justice (over and above open justice) was achieved between the parties. In September 2011, a call for evidence was made by the Joint Committee on Privacy and Injunctions (UK Houses of Parliament). The list of questions to be addressed make interesting reading and include: how has the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions operated in practice, how best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life and issues relating to the enforcement of anonymity injunctions and super-injunctions including the Internet, cross border jurisdiction within the UK parliamentary privilege and the rule of law. At the date of finalisation of this article, the Joint Committee was in the process of hearing evidence. The reader is referred to the Joint Committee website for the transcript of the oral evidence which makes very interesting reading. The reader should refer to the Joint Committee report when it becomes available <http://www.parliament.uk/business/committees/committees-a-z/joint-select/privacy-and-super injunctions/> (accessed 1 October 2011). Cross border and enforcement issues are likely to become increasingly significant. See generally the on-going saga (October 2011) involving the whistle blowing website, *Wikileaks*.

70 [1988] Ch 333 at 358; [1987] 3 All ER 276 at 291. This case concerned criminal contempt by a non-party of an order restraining publication pending trial.

the case of personal secrets where these concern a public figure such as to generate serious public interest or reasonable "role model" type concerns. If confidential and or private facts are perishable, the same can be said to be true of many items of news. The need for a timely publication of news can be very important not just from a commercial perspective (to the newspaper) but also from the perspective of the public interest that has been engaged. In the UK, the "fear" that the European Convention for the Protection of Human Rights and Fundamental Freedoms and the development of an extended right to protect private facts might emasculate freedom of expression through overly frequent grants of interim injunctive relief lay behind the enactment of s 12 of the Human Rights Act 1998. This provides that an interim injunction is not 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.[71] This means that the *American Cyanamid* approach[72] (serious issue to be tried) to the grant of interlocutory relief no longer applies in the UK where the Human Rights Act is implicated: a higher standard is required where freedom of expression is engaged.

37 In the *Mosley* case, by the time the claimant became aware of the publication "the cat was already out of the bag" and it will be recalled that Eady J had no choice but to decline the application for an interim injunction since the video material was already widely known and easily accessible from various websites on the Internet. If Mosley had been aware of the impending publication, he would have sought and in all likelihood obtained an interim injunction (notwithstanding s 12) withholding publication till determination of the substantive rights at trial. Given the decision of Eady J and the views expressed by the ECHR, there is little doubt that a permanent final injunction against publication of the material and especially the video extracts would have been granted. If this had happened, problems of assessing compensatory damages would have been much reduced. If Mosley had been able to make a timely application for interim relief, it is an interesting question as to whether he would have sought and obtained a "gagging order" or "super-injunction" over and above anonymity. A super-injunction is essentially a gagging order designed to reinforce the interim order not to

71 See *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 and G Wei, "Milky Way and Andromeda: Privacy, Confidentiality and Freedom of Expression" (2006) 18 SAcLJ 1 at 22. See also the statement of Jack Straw, MP, Hansard HC Debates 2 July 1998, col 536 that s 12 is intended to ensure *ex parte* injunctions are granted only in exceptional circumstance. Cited by the Report of the Committee on Super Injunctions, Anonymised Injunctions and Open Justice (Neuberger Report) (May 2011) at para 1.5. The reader should note that many of the recent English cases (2010 and 2011) on privacy involved application for interim injunctive relief.

72 *American Cyanamid v Ethicon* [1975] AC 396.

publish. It requires the defendant (and possibly any third party) to refrain from publishing the very fact that the interim injunction has been sought and granted. The rationale being that otherwise the public would already know of the broad nature of the proceedings that the claimant was involved in such a way as to cause irreparable harm to his state of privacy.[73] Where a super-injunction/gagging order has been granted, the public will only be informed if: the injunction is breached;[74] the court lifts the order; or the information is disclosed by a Member of Parliament in the House of Commons (under the protective umbrella of parliamentary privilege).[75] In order to get around the parliamentary privilege "loophole", the claimant might ask for what has been termed a "hyper-injunction". This is an injunction restraining communication

73 But in such a case an order requiring anonymity should be enough to protect the claimant. True super-injunctions are likely to be justified only on exceptional facts such as where there is a fear that the defendant may be tipped off before the order can be served. See the Report of the Committee on Super Injunctions, Anonymised Injunctions and Open Justice (Neuberger Report) (May 2011) at para 2.1 which explains that super-injunction is a term which has not been used with precision. The term has been used to refer to an interim injunction which provides for party anonymity; which contains a prohibition on publishing or disclosing the fact of the substantive order and proceedings; which provides for both party anonymity, a prohibition on publishing or disclosing the fact of the substantive order and proceedings, as well as, for instance, restricting access to documents on the court file. This was to be contrasted with an anonymised injunction which is "an interim injunction which restrains a person from publishing information which concerns the applicant and is said to be confidential or private where the names or either or both of the parties to the proceedings are not stated". See the Neuberger Report at para 2.14 that the "super" element is the part of the order that restrains a person publishing or informing others of the existence of the order and the proceedings.

74 Covert breaches may be very hard to prevent, such as where the information is disclosed anonymously on the Internet or through use of social media such as Twitter. See the article by Torin Douglas, BBC media correspondent <http://www.bbc.co.uk/news/uk-13338502> (accessed 1 February 2012). The Neuberger Report at para 2.6 states that where a super-injunction is in force, breach of its terms, either by those against whom it is issued or by third parties with notice, is contempt of court. See below and injunctions *contra mundum*.

75 See the summary by Tim Dowling for *The Guardian* <http://www.guardian.co.uk/law/2011/mar/21/secrets-to-keep-hyper-injunction> (accessed 20 May 2011). See also *MNB v News Group Newspapers Ltd* [2011] EWHC 528 (QB). An interim injunction in this case was granted by Sharp J that protected the anonymity of the claimant. Subsequently, the claimant was identified in Parliament as Sir Frederick Goodwin. The application to discharge was heard by Tugendhat J who noted that no super-injunction had in fact been granted or asked for. The order and reasons of Sharp J had in fact been available at <www.bailli.org> since 9 March 2011. See *Sir Frederick Goodwin v News Group Newspapers Ltd* [2011] EWHC 1309 at [9]. Tugendhat J varied the terms of the injunction on 19 May to allow the identification of the claimant (leaving other aspects in place). It is to be noted that the Sir Frederick Goodwin through his counsel had informed Tugendhat J that he did not oppose the variation to permit identification but that he objected to discharge of the whole order. See also n 92 below.

of the fact of grant to anyone including Members of Parliament save for the parties own lawyers.[76]

38 Super-injunctions, anonymised injunctions and hyper-injunctions have caused considerable disquiet in the English public in general, doubtless at least in part because of "aggressive" newspaper and media articles. Any restriction on reporting judicial decisions is seen as an inroad on the principle of open justice. The first chapter of the Neuberger Report underscored the fundamental importance of open justice to any system of law committed to the rule of law within a liberal democracy.[77] Open justice requires that the media be entitled to impart and the public to receive information on judicial proceedings. It is said to be part and parcel of the principle that justice must be done and be seen to be done. Since the principle of open justice is a means to an end (to achieve justice), it must follow that there will be circumstances where the public interest in seeing that substantial justice is done will allow and indeed require redaction of information. When and how much information needs to be redacted will depend on the circumstances. Difficult questions of judgment can arise, but the principle is clear. There will be cases where substantial justice between the parties cannot be done in the open.[78]

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76 See the Neuberger Report at p vii which explains that parliamentary privilege is thought not to extend as a general rule to communications between a constituent and his/her MP. If the communication is protected by parliamentary privilege, no court order could oust that privilege. A similar point was made by Tugendhat J in *Sir Frederick Goodwin v News Group Newspapers Ltd* [2011] EWHC 1309 at [5].

77 Citing the famous dictum of Lord Shaw in *Scott v Scott* [1913] AC 417 at 463 that open justice was of constitutional importance because it is "on the whole, the best security for the pure, impartial and efficient administration of justice, the best means for winning for it public confidence and respect". The principle was restated by Lord Judge CJ in *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 and referred to by Tugendhat J in *John Terry v Persons Unknown* [2010] EWHC 119 (QB). The grant of super-injunctions and the effect on open justice has also been recently raised in Australia. See the article by Richard Ackland, "Not So Super: Attorney General Must Stay Alert to Mighty Gag Orders" *The Sydney Morning Herald* (28 October 2011).

78 See Lord Haldane in *Scott v Scott* [1913] AC 417 at 26 that since the paramount object is to do justice, the general rule as to publicity (which is just a means to an end) must accordingly yield in some cases. For the relevant UK and European provisions, see Art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms which sets out the general provision of a right to a fair and public hearing. The Article also states that the public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. See also r 39.1 of the English Civil Procedure Rules ("CPR") that hearings are to be held in public unless certain stated exceptions apply. For example, that publicity would defeat the object of the hearing or it involves matters relating to national security or involves confidential information, *etc*. Provisions on

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39 One such area concerns claims in respect of confidential trade secrets. Publication in the judgment of the details of the trade secret will destroy the very confidentiality which gives the information its value and importance.[79] It may even have an adverse impact in some cases of patentability. In such cases, any claimant who is advised that the court decision will be made publicly available and will include the details of the trade secret is likely to settle or abandon the legal proceedings. This cannot be right.[80] Similarly, given the immense problems in carving out an adequate financial remedy where private facts have been unjustifiably published, there must be a case for measured judicial control over the amount of information that can be published where an interim injunction is claimed.

40 Where an action is brought in respect of confidential/private facts, it does not follow that the public interest in ensuring justice is done will always require that there be a blanket prohibition on publication of all information including the fact of proceedings where privacy is engaged. In some cases it may be sufficient to require anonymisation. In other cases involving highly vulnerable claimants such as small children or highly sensitive personal information such as

restrictions and the reporting of proceedings can be found in the Administration of Justice Act 1960 (c 65) (UK). For an example where the hearings were ordered to be conducted in private under r 39.2 of the CPR, see *DFT v TFD* [2010] EWHC 2335 (QB). See also the summary by Mark Thompson, "Protecting Privacy in Court Proceedings" (27 October 2010) <http://inforrm.wordpress.com/2010/10/27/protecting-privacy-in-court-proceedings-mark-thomson/> (accessed 1 October 2011). For an example where a judgment was redacted even though the names of the parties were not anonymised in a privacy suit which failed at trial because of a public interest defence, see *Rio Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB). In delivering his judgment, Nicol J noted that pre-trial Eady J had made orders temporarily restricting public access to specified parts of the statements of case (and some other items) as well as to divide the trial into public and private sections. See also *Christopher Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808. On appeal, the claim to protect privacy was dismissed. The claim to a reasonable expectation of privacy as to the bare fact of a relationship was rejected by the trial judge and found to be of a borderline nature on appeal. The balancing exercise in any case was against the claimant. In delivering the judgment, Gross LJ stated that as a result "KGM" could now be referred to by his name and that the judgment of the Court of Appeal and that of the trial judge are public judgments – albeit that some minor redactions were to remain in place.

79 This was recognised by Lord Haldane LC in *Scott v Scott* [1913] AC 417 437 and cited by the Neuberger Report at para 1.19. In Singapore, see *Creative Technology Ltd v Aztech Systems Pte Ltd* [1996] 3 SLR(R) 673 where copyright infringement was alleged in computer software. The confidential source code program was analysed in deciding whether there was copying of a substantial part. The evidence was redacted to protect the trade secrets. See also n 111 below.

80 See the Neuberger Report which takes up the point at para 1.21 that knowledge that any future proceedings will be conducted in public could deter those who needed to resort to the courts. This could lead people to take matters into their own hands. Note that in some cases, (confidential) arbitration may be preferable.

sexual preferences, serious medical conditions, *etc*, it may be that a super-injunction is necessary at least until the time when the court has been able to make an assessment of any public interest said to support the disclosure on the return date or otherwise. Where the European Convention for the Protection of Human Rights and Fundamental Freedoms is engaged, a court following the guidance of the House of Lords in *Cream Holdings Ltd v Banerjee*[81] will, in any case, only grant an interim injunction if there is a strong likelihood that the claimant will succeed in obtaining a final injunction at trial. A careful examination of any public interest that is said to demand publication (immediate or otherwise) must be undertaken and the interim injunction only granted if necessary to safeguard the claimant's interests.[82] It follows that even more care must be taken where the interim injunction is reinforced by an order against publication of the fact of the proceedings. Is it necessary to derogate so far from the principle of open justice or are the interests of the claimant sufficiently protected by an order that merely requires party anonymity and redaction of sensitive facts in the judgment?[83] Indeed anonymisation is not new. There have been cases

81 [2005] 1 AC 253.

82 That said it bears repeating that in some cases and especially where privacy is the right as to which invasion is threatened, postponing the injunction until the conclusion of the trial would be equivalent to denying it altogether. See Lord Cottenham in *Prince Albert v Strange* (1849) 41 ER 1171; 1 Mac & G 25 at 47 and cited by the Neuberger Report at para 1.3.

83 See the Neuberger Report at para 1.27 ff for a list of factors to be taken into account. (a) The burden is on the applicant to demonstrate through clear cogent evidence a need for derogation from the principle of open justice. The derogation must be necessary and proportionate. (b) The application must be subject to intense scrutiny by the judge. (c) Care is needed in deciding what information is to be prevented from entering the public domain. The derogation must be kept to the minimum. (d) Each decision is fact sensitive. In some cases, a short term super-injunction may be all that is needed as in anti-tipping off cases. (e) The court is not bound by any agreement the parties may have made as to the derogation from open justice. (f) The principle of open justice applies to both interim and trial proceedings. (g) In deciding whether to grant derogation, the court is not exercising a wide discretion. Any grant is exceptional. Note that the Neuberger Report stressed that an anonymised injunction is not the same as a super-injunction. In such cases, only the identity of the parties are withheld. The leading English case on anonymisation is *JIH v News Group Newspapers Ltd* [2011] Civ 42. The English Court of Appeal listed ten factors similar to those identified in the Neuberger Report. Considerable emphasis was placed on the need for careful scrutiny of the application whether there are alternatives to anonymisation. For a pre-Neuberger Report case on super-injunctions and anonymity, see also *Adakani Ntuli v Donald* [2010] EWCA Civ 1276. At [47] Kay LJ states that whilst super-injunctions had attracted considerable publicity, there is much that is simply a reflection of general principles. The starting point was the principle of open justice. But the rule was not absolute. The question was whether on the facts there was a countervailing consideration such that the derogation (super-injunction element and anonymity) was necessary in the interests of justice. On the facts, the Court of Appeal felt that provided the reporting was limited to what was set out in

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even before the passing of the Human Rights Act 1988 in the UK where anonymisation was necessary to protect the interest of the claimant (whether under special statutory provisions such as those dealing with identity of rape victims or under general principles).[84] Where a super-injunction, hyper-injunction or anonymised injunction is granted, they are to be kept under constant judicial review as they should not in general be permanent. This means that pro-active case management is critical to ensure that a super-injunction, *etc*, granted early in the proceedings lasts no longer than is needed. Return dates will be required so that there is constant judicial supervision unless the facts are so extreme such that a "permanent" interim order can be justified.[85]

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the judgment there was no need for a super-injunctive element or anonymity. See also *John Terry v Persons Unknown* [2010] EWHC 119 (QB) at [108] that each derogation from open justice must be justified on the particular facts of the case in accordance with the intense scrutiny required: implicitly rejecting the view that extensive derogations from open justice should be routine in privacy cases. See also the news article posted by Siobhain Butterworth & Maya Wolfe-Robinson, "Superinjunctions, Gagging Orders and Injunctions: the Full List" *The Guardian* (5 August 2011) <http://www.guardian.co.uk/law/datablog/2011/aug/05/super injunctions-gagging-orders-injunctions-list> (accessed 1 February 2012). An interesting point made by the writers is that the list of cases (at that time) suggested that in many of the cases the press did not put forward a public interest defence or abandoned it at an early stage or took a neutral stance on the question of whether or not an injunction should be granted.

84 For, *eg*, *X v Y* [1988] 2 All ER 648 (identity of medical practitioners suffering from HIV). The Neuberger Report at para 1.14 recognises that with changes in social attitudes and technological development (the Internet) the frequency of cases meeting the exceptional standard for anonymisation may increase. There is much to be said for this. The widespread use of e-mail, text messaging, social networks such as Facebook and Twitter means that "juicy news" can spread with alarming speed and ease. In the past, a juicy story published in an English tabloid in the 1970s would not have the same impact in the UK and the world at large as an equivalent release today. The fact that gossip released on the Internet is often described in terms of "going viral" is testimony to the power of new media. It is submitted that the scale of internet exposure is so large and fast that publication today is qualitatively different from print media of yester-centuries. The law must find a way to keep up. That much is clear. How – is the problem. In Singapore, see *X Pte Ltd v CDE* [1992] 2 SLR(R) 575 which concerned an action in respect of confidential personal information arising in connection with an extra-marital affair. The names of of the parties were anonymised. See also n 91 below.

85 One such case is said to be *RST v UVW* [2010] EMLR 13 and cited by the Neuberger Report at para 2.35. Note that the Neuberger Report in making its comments against permanent super-injunctive orders at the interim stage was not stating that the same held true for final injunctions granted at end of trial. Final injunctions securing secrecy or anonymity could be made if necessary to secure the parties' substantive rights. See the Neuberger Report at para 2.37.

D. Injunctions contra mundum

41 English law has long recognised that common law courts act *in personam*. Whilst courts have the power to grant orders regulating their procedure, it is not normally competent for a court to hold a person bound by an injunction where that person is not a party to the cause of action.[86] Since the recognition of this rule in 1802, exceptions slowly developed. Initially these were confined to wardship (*parens patriae*) proceedings. Then in the late 1980s the *Spycatcher* litigation in England paved the way for a significant expansion in connection with confidential information. A person who reveals confidential information with knowledge of the court's restraining order and thereby thwarts its purpose would be liable for criminal contempt of court.[87] The essential purpose of the interim restraining order was explained in terms of the need to hold the ring until trial. Once a permanent injunction was granted following a trial or by consent it followed that the *Spycatcher* doctrine was no longer necessary.[88] Non-parties were thought no longer to be liable for contempt if they revealed the confidential information. But is that always the case? In England, the coming into force of the Human Rights Act necessitated a fresh approach to meet the "new era" and the acceptance that remedies had to be fashioned to meet the particular needs of the case in the light of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[89] The remedy of an injunction *contra mundum* was now available in England wherever necessary and proportionate for the protection of the Convention rights whether of children or adults. The *OPQ v BJM and CJM*[90] case in England has been described as an "ordinary blackmail case". The first defendant had been negotiating with a newspaper for the sale of intimate photographs and other information concerning the claimant. As a deal approached, the first defendant contacted the claimant's solicitor with a view of doing a deal so as to "make the problem go away". Eady J explained that this was a case where the information was clearly private and that a duty of confidence was owed by the first defendant to the claimant. There was no public interest in

86 *Iveson v Harris* (1802) 7 Ves Jun 251 at 256–257, *per* Lord Eldon.

87 *AG v Times Newspapers* [1992] 1 AC 191; *AG v Newspaper Publishing plc* [1988] Ch 333 and especially Lloyd LJ at 380.

88 See the summary of Eady J in *OPQ v BJM and CJM* [2011] EWHC 1059 at [7]–[9].

89 *Venables and Thompson v News Group Newspapers Ltd* [2001] Fam 430, *per* Dame Elizabeth Butler-Sloss P and *Re S (A Child)* [2004] Fam 43, *per* Lord Phillips MR. The new approach argues that it is no longer necessary to rely on the court's inherent jurisdiction. The foundation of the jurisdiction to restrain publicity could be regarded, since the advent of the Human Rights Act 1998 (c 42) (UK), as deriving from the European Convention for the Protection of Human Rights and Fundamental Freedoms (*OPQ v BJM and CJM* [2011] EWHC 1059 at [17], *per* Eady J).

90 [2011] EWHC 1059.

the confidential information. There was also evidence of likely adverse impact of publicity on the health (including mental health) and well-being of various members of the claimant's family. For these reasons, a *contra mundum* injunction was granted even though final judgment had been entered. Any newspaper which revealed the confidential/private information would be liable for criminal contempt.

E. New media and the 21st century

42 A recurring theme behind the recent spate of English cases is the huge impact that new media and the Internet are having on privacy. The point has been made earlier that exposure of private facts on the Internet (whether via websites or social networks) reaches an audience that is quantitatively and qualitatively of a different magnitude from the good old days of "pure print media" and national television/radio broadcasts. Individuals can access the information at a time of their choosing and in many cases as many times as they wish. Memories of salacious facts can be endlessly refreshed with an ease that was not available in times gone by. Life in the information society necessarily means that the scope for privacy has narrowed. Some will say this is a good thing. Society and the law must move on and accept that it will be much harder for individuals to secure private facts from public scrutiny. Indeed it is sometimes suggested that the generation who have grown up with social media are much less concerned with anonymity and the need for personal privacy. How else, so it is argued, do we explain the huge success of Twitter and Facebook? This is the price to be paid for the advances and real benefits of the information society. Then there will be those who argue that it is precisely because there is so little privacy left in the crowded information driven world that the law must protect what privacy remains with renewed strength and vigour. New information technologies have not made obsolete the various reasons as to why a state of privacy is important to individuals and society as a whole. A balance must be found as has been recognised by the Neuberger Report. "Open" justice is about justice. If the law has evolved a legal or equitable right to protect private/confidential facts, it must be prepared to offer appropriate remedies to vindicate those rights. Legal proceedings in the "open" which result in the destruction of the very legal or equitable right/interest that is litigated over would be perverse. If the objection is to the development of a legal right of privacy over personal facts, better to deny or fight the development of the substantive right than to deny appropriate remedial responses where the right is recognised by the law.

43 The impact of technology on the ability of individuals to secure private personal space has been commented on by other senior members of the English judiciary. Recently, Lord Judge CJ in a media

address[91] referred to the fact that modern technology was "out of control" and that even where super-injunctions were properly granted, bloggers and social media such as Twitter were enabling thousands of users to publish information that newspapers and television stations were prevented from revealing by court orders. It will be recalled that in the *Mosley* case, the widespread availability of the video images on the Internet was the crucial reason why Eady J declined the role of King Canute and refused to grant the interim injunction. Would there have been that much of a difference if Mosley had been able to secure a super-injunction at a very early stage on the degree of publication? How many "tweeters" and "bloggers" would have eventually obtained access and posted disclosures in any case? If the video images went viral on the Internet, the fact that thousands of individuals may be liable for contempt of the English court order may not have provided much *solatium* to the claimant.[92] In the case of the famous English footballer

91 <http://www.guardian.co.uk/law/2011/may/20/superinjunction-modern-technology-lord-judge> (accessed 24 May 2011). Note, it was also reported that Lord Judge made the interesting comment that exposure via Twitter, *etc*, had less impact than traditional media because greater trust is placed in traditional media.

92 In the UK, see, for example, the recent cases where notwithstanding the grant of super-injunctions (or at least injunctions requiring anonymity) the identities were revealed through Twitter and also under the cloak of parliamentary privilege. The first case concerned the chief executive officer of a large bank who had formed a relationship with a lady. An interim injunction granted by Henriques J restraining publication and requiring anonymisation. The key order prohibited the publication until the return date of "any information concerning the subject-matter of these proceedings or any information identifying or tending to identify the applicant save for that contained in this Order and in any public judgment of the court given in this action". This was not a true super-injunction case. An article was subsequently published by a newspaper stating that an individual with a particular occupation had "gagged" the newspaper. The claimant asserted that this was a breach of the court order. The claimant accepted that the newspaper could publish an article criticising the order and how the law was being enforced. The claimant asserted that the article contained private information that breached the order. An anonymisation order was said to be needed to prevent jigsaw identification – that is different papers revealing different bits of information which collectively identifies the claimant. On the return date hearing, Sharpe J agreed that the claimant was entitled to an order that ensured that his rights are protected to the extent necessary to prevent his identification. See *MNB v News Group Newspapers Ltd* [2011] EWHC 528. Subsequently, the identity of the claimant as Sir Frederick Goodwin entered the public domain through disclosure in Parliament. This led to an application to discharge the injunction which was heard by Tugendhat J and reported as *Sir Frederick Goodwin v News Group Newspapers Ltd* [2011] EWHC 1309. The order was varied so as to permit identification of the claimant but not the lady who was involved. The variation was without prejudice to the right to pursue a claim for damages for invasion of privacy/defamation. See also n 75 above. This led to a further application to vary the order again so as to permit identification of the lady and/or her job description. Given the fact that her job position, within the same company as the claimant, impacted on public interest arguments, Tugendhat J held that it was unlikely that the bare fact of a relationship attracted a reasonable expectation of privacy. The

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whose identity was protected and then revealed on the Internet (Twitter) and in Parliament, the individual users of social media who posted information of the identities protected by the order could well be liable for contempt under English law. Whether it is practical to identify and to prosecute the individuals is quite another matter.[93] Many of the

order was varied allowing publication of her job description but leaving in place the prohibition against publication of her name. See *Sir Frederick Goodwin v NGN Ltd* [2011] EWHC 1437. On expectation of privacy and possible conflicts of interests concerning relationships within an employment context, see *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103. The second case involves a Premier League football player who was married and information concerning an extra-marital relationship: *CTB v News Group Newspapers Ltd* [2011] EWHC 1334, [2011] EWHC 1326, [2011] EWHC 1232. An interim restraining order was granted by Eady J on 14 April 2011 and continued on 20 April 2011. The order also protected the anonymity of the claimant. Subsequently, an application was made to vary the terms of the injunction because of the widespread coverage on the Internet since 14 April 2011. It was argued that it was now pointless to maintain the claimant's confidentiality – notwithstanding the absence of any legitimate public interest. The order (anonymity) was maintained notwithstanding revelation of the claimant's identity on social media. Eady J distinguished *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (on interim injunctive relief) on the basis that the intimate video footage had been seen by hundreds of thousands even before the application was made for the order. In *CTB*, the disclosure of the claimant's identity took place after the interim order was granted. "Different policy considerations come into play when the court is invited to abandon the protection it has given a litigant on the basis of widespread attempts to render it ineffective": [2011] EWHC 1326 at [19]. Shortly thereafter the identity of the claimant was revealed in Parliament by an MP. This led to a further application heard by Tugendhat J to lift the anonymity restriction on the basis that the identity was now readily available. Tugendhat J declined to do so because the purpose of the injunction was not just to protect a secret but to prevent intrusion and harassment of the claimant and his family. "The fact that tens of thousands of people have named the claimant on the Internet confirms that the claimant and his family need protection from intrusion into their private and family life. The fact that a question has been asked in Parliament seems to me to increase and not diminish the strength of his case that he and his family need that protection": [2011] EWHC 1334 (QB) at [3].

93 Orders are sometimes granted against internet service providers compelling revelation of the identity of persons hosting websites containing copyright infringing material, *etc*. In Singapore, see generally, G Wei, "Pre-Commencement Discovery and the *Odex* Litigation: Copyright *versus* Confidentiality or is it Privacy" (2008) 20 SAcLJ 591. In the UK, it has been reported in the press that the footballer has taken legal proceedings against Twitter for the publication of information covered by the injunction by its users (*CTB v Twitter & Persons Unknown* (Queens Bench Division, HQ11X01814)). The order sought apparently is to compel disclosure of the identity of the Twitter users behind the publication. See <http://www.bbc.co.uk/news/technology-13477811> (accessed 1 February 2012). It appears from the news report that whilst the order was obtained in the UK, it will have to be served on Twitter in California. It remains unclear (at the time of writing) whether Twitter is subject to English jurisdiction and whether the California courts will assist in the enforcement of the English order. It has also been reported that Twitter is prepared to hand over user information if it is legally

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individuals are likely to reside outside of the UK. Legal action against the internet service providers, operators of websites and the providers of social media internet services on the basis of secondary liability or aiding and abetment principles will not be easy. Governing laws in different jurisdictions will take a different view and problems of applicable law as well as recognition of the English "gagging orders" are bound to arise.

44 Even more problematic (for the privacy claimant) is disclosure by Members of Parliament within the House. Parliamentary privilege is absolute although there may be some argument as to whether communications between individuals and Members of Parliament outside the House are covered. Then again, are newspapers entitled to report on words spoken in Parliament even when they are aware of the presence of a judicial restraining order? The Neuberger Report states that in the UK, media reporting of parliamentary proceedings in *Hansard* or any other publication ordered by Parliament is protected by an absolute immunity set out in the Parliamentary Papers Act 1840.[94] Where a summary of *Hansard* is reported this is protected by qualified privilege. This means that the summary must be published in good faith and without malice. This looks promising for the media save for the pertinent point that the Neuberger Report concludes that "there is no judicial decision as to whether a summary of material published in *Hansard* and which intentionally had the effect of frustrating a court order would be in good faith and without malice". The Neuberger Report goes on to add that where the news report is more than just a summary of *Hansard* or parliamentary proceedings the protection of qualified privilege may not attach. If it did not attach, further tricky legal questions would arise as to whether common law could develop a defence based on honest and fair reporting of parliamentary proceedings.

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required to do so. See *Today* 27 May 2002) (Singapore). See also *The Daily Telegraph* (30 May 2011) (UK) <http://www.telegraph.co.uk/technology/twitter/8536641/Gagging-orders-Twitter-prepared-to-hand-over-user-data.html> (accessed 30 May 2011). The status of the claim against Twitter is, however, unclear at the date of writing.

94 <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf> (accessed 1 May 2011). In Singapore, see Parliament (Privileges, Immunities, Powers) Act (Cap 217, 2000 Rev Ed). Section 3 provides that the privileges, immunities and powers are to be the same as those of the Commons House of Parliament of the UK. Section 5 provides that there shall be freedom of speech and debate and proceedings in Parliament, and such freedom of speech and debate and proceedings shall not be liable to be impeached or questioned in any court, commission of inquiry, committee of inquiry, tribunal or any other place whatsoever out of Parliament. Sections 7and 8 set out immunities in respect of publication of parliamentary proceedings.

F. Judiciary and Parliament

45 Embedded in the broiling controversy over judge-made super-injunctions, gagging orders and new or expanded rights to protect private/personal facts is the question as to which estate has the right to take the lead role in developing a law of privacy for Britain. Even David Cameron the British Prime Minister has apparently weighed in and questioned whether English judges were "usurping the role of legislators".[95] The British Prime Minister has been reported saying that "the danger is that judgments are writing a new law which is what parliament is supposed to do" and that "I think there is a question here about privacy and the way our system works". "What's happening here is that the judges are using the European Convention on Human Rights to deliver a sort of privacy law without parliament saying so."

46 This is not the place to embark on a review of how English law on privacy and personal facts has developed since 2000 when the Human Rights Act 1998 came into operation. It should, however, be remembered that the Human Rights Act 1998 was enacted to entrench the Convention rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms into English law and that to the extent that the English judiciary have developed a super-charged law of confidential information in the area of private/personal facts, that they are doing no more than what is required of them by the Human Rights Act 1998 and the Convention. This is not a case of "naked judicial activism" which disregards the democratic authority of the English Parliament. Indeed, as is well known, several other leading common law jurisdictions (Australia and News Zealand) are not far behind and have through judicial decisions expanded the scope of protection for private/personal facts even though they are not bound by the Convention. The Neuberger Report rightly lays stress on the point that injunctions are procedural remedies ancillary to the substantive law. They are used to protect and enforce substantive legal rights. No injunction, super or otherwise, can be granted if no substantive right exists. The mandate of the Neuberger Report was not to review the substantive legal rights that have developed. The Neuberger Report recognised that that there is vigorous and on-going debate over how the substantive law has developed in respect of privacy and freedom of expression in the light of the Human Rights Act and whether the courts have developed long established forms of privacy protection appropriately. But that must be a matter for the Government of the day and Parliament. No doubt if the UK Parliament finds that

95 See George Parker & Helen Warrell, "Disclosure poses direct challenge to the courts" *The Financial Times* (23 May 2011) <http://www.ft.com/cms/s/0/322cdde0-8585-11e0-ae32-00144feabdc0.html> (accessed 1 May 2011).

there is now over-protection for private personal facts it may well wish to enact a statute cutting back or modifying the rights and remedies that are to be made available.[96] Until that happens, the Judiciary has no choice but to develop the law in the time honoured case by case basis. This is not to say that judges cannot and do not make law or evolve principles that make significant changes to legal rules. As is well known, many substantive rights which are now taken for granted and which are or at least were hugely important (especially when first developed) such as the tort in *Wilkinson v Downton*,[97] the tort of negligence and so forth are the creations of judges. Innovative and hugely important procedural remedies such as the *Mareva* injunction[98] are also the developments of the common law process.

V. Conclusion: Private facts in the 21st century and Singapore

47 Singapore of course is not in any way bound by the developments in the UK and Europe. The Constitution of the Republic of Singapore does not refer specifically to a right of privacy. Elsewhere an attempt has been made to argue that even so, the spirit of privacy and the right of an individual to be "let alone" is embedded in the list of fundamental liberties set out in the Singapore Constitution. Development of actions that seek to protect the value of privacy should not be regarded as something that is contrary to the Constitution.[99]

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96 See Sam Coates, Frances Gibb & Michael Savage, "Top Judge to Face MPS in Search for Solution to Privacy Crisis" *The Times* (25 May 2011) <http://www.thetimes.co.uk/tto/law/article3038295.ece?CMP=EMCeb2> (accessed May 2011). This must be subject, however, to the duty to comply with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The article refers to a Parliamentary Committee to be set up in the UK to review privacy laws. See also Owen Bowcott, "Privacy Should be Made by MPs, Not Judges Says David Cameron" The Guardian (21 April 2011) <http://www.guardian.co.uk/media/2011/apr/21/cameron-superinjunctions-parliament-should-decide-law> (accessed 1 February 2012). Whilst many English newspaper commentaries have been critical of the expansion of protection for privacy, there are some news commentators who are supportive. See, eg, Mary Ann Sieghart, "We do need to stop the muck rakers" *The Independent* (20 June 2011).

97 [1897] 2 QB 57. This case concerned intentional/reckless infliction of psychiatric injury.

98 *Mareva Compania Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyds Rep 509; G Wei, "The *Mareva* Injunction: Some Recent Developments" (1983) 25 Mal LR 12.

99 See G Wei, "Milky Way and Andromeda: Privacy, Confidentiality and Freedom of Expression" (2006) 18 SAcLJ 1. See also *X Pte Ltd v CDE* [1992] 2 SLR(R) 575 that the action breach of confidence was not inconsistent with the constitutional provisions on freedom of speech in Art 14(1)(*a*) of the Constitution of the Republic of Singapore. In the US, see *Griswold v Connecticut* 381 US 479 (1965), *per* Justice Douglas that zones of privacy could be found in the penumbra of

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Singapore has not yet developed anything like a cause of action that seeks to protect directly privacy or the right to be let alone. Neither does it have a statutory equivalent to the English Protection from Harassment Act 1997.[100] But it does have all the usual common law torts including nuisance as well as the action in equity to protect confidential information.

48 As is now well known, the most exciting development in the area of privacy in Singapore is the decision of the High Court in *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta*.[101] That case established (if only tentatively) a tort of harassment in Singapore that comes close to the statutory tort that now exists in the UK. The decision has attracted much comment and has yet to be affirmed by subsequent case law. Some may feel that the decision sails too close to judicial legislation: others may see it as pro-active evolutionary case development of tort law. Either way, the decision remains and has not been subject to adverse parliamentary criticism. If the *Malcomson* decision becomes entrenched into Singapore tort law, might there be room for a reappraisal of the scope of the action to protect confidential information in the area of private facts? Will a Singapore court take the view that a judicial extension along the lines of *Campbell v MGN Ltd* in the UK will be no more sensational or inappropriate than the birth of the *Malcomson* tort?[102] After all, even the existing law of confidence without tweaking clearly provides protection for many types of private facts. If a case similar to *Max Mosley* arises in Singapore, is there not room for the view that the information in question (involvement in sado-masochistic activity) was confidential *and* personal and that the female participant who made the recording and disclosure was subject to a binding equitable obligation of confidence under conventional reasoning? Or will the Singapore court take the view that Singapore society is different and apply either *ex turpi causa non oritur actio* or a public interest "role model" type defence (where the claimant is a public figure) in a similar case?

49 Unauthorised use would not be a problem under the action for breach of confidence and the mental distress suffered must surely be something that equity will recognise in the context of confidential

various constitutional provisions (First Amendment; Third Amendment; Fourth Amendment; Fifth Amendment and Ninth Amendment).

100 1997 c 40.

101 [2001] 3 SLR(R) 379.

102 For a detailed discussion of *Campbell v MGN Ltd* [2004] 2 AC 457, see Saw Cheng Lim & Gary Chan, "The House of Lords at the Crossroads of Privacy and Confidence" (2005) 35(1) *Hong Kong Law Journal* 91. See also G Wei, "Milky Way and Andromeda: Privacy, Confidentiality and Freedom of Expression" (2006) 18 SAcLJ 1.

personal information. After all, the equitable duty of good faith is imposed surely to give peace of mind to those to whom the duty is owed. In a globalised world where personal information can be commercially extremely valuable and where Singapore may need to access databases containing personal data from overseas whether for research or data processing, is there a need for her to reassess the level of protection currently afforded? It goes without saying that Singapore, giving due weight to international viewpoints, will need to find its own solution. Is there a problem that needs to be fixed either by the judges or by Parliament? How prevalent are intrusions into privacy by members of the press or individuals in Singapore? Of course, Singapore like so many other developed nations has embraced the information age and information technologies from electronic road pricing devices to CCTV and the setting up of centralised databases such as for medical records. How many cases (if any) have there been where personal information captured for specific purposes has been disclosed or used for other inappropriate purposes? Is internal self-regulation sufficient to address the danger of abuse? Is there an internal self-regulatory code of conduct applying to journalists in Singapore and if so how has that code operated in practice? If there is an unacceptable risk that new high definition CCTV cameras will capture images that may be embarrassing if disclosed to the public, is the better approach (as opposed to a new action to protect private facts) to employ tailored made regulations governing the use of CCTV data etc?[103] These are by no means easy

103 See the views of Lord Hoffmann in *Wainwright v Home Office* [2003] UKHL 53 at [32] commenting on the decision of the European Court of Human Rights in *Peck v United Kingdom* (2003) 36 EHRR 41. In that case, the European Court of Human Rights found UK law not adequate to deal with the embarrassment of the claimant when an image of him cutting his wrist (attempted suicide) was captured by CCTV. The image was later published without adequate pixilation. Lord Hoffmann's view was that tailored made rules governing use of CCTV images was better than a new tort of privacy. In the area of unsolicited telemarketing messages, Singapore, for example, is proposing to introduce an opt-out "Do Not Call" register in 2012. See the proposed Consumer Data Protection Regime for Singapore that underwent a public consultation exercise in September/October 2011. See Pt V of the Consultation Paper and n 106 below. Unsolicited telemarketing calls involve use of an individual's personal contact information (especially telephone numbers) by organisations for unsolicited telemarketing purposes. An individual who is "bombarded" by unwanted telemarketing calls – especially from the same source may well feel aggrieved that his personal contact information has been used in a manner such as to result in a degree of harassment. Establishing that the telephone number, *etc*, is confidential or private may not be that easy (but not impossible). Establishing harassment (as a matter of law – does the tort exist – and as a matter of fact) is likely to be even harder. This is likely why Singapore is now considering some form of specific regulatory control of the unsolicited telemarketing calls. In the area of Spam, see also the Spam Control Act (Cap 311A, 2008 Rev Ed) which covers unsolicited commercial communications sent out in bulk by e-mail or multi-media messaging to mobile phone numbers. On 31 October 2011, another consultation paper was issued on the national "Do Not

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questions for Singapore to answer and for that reason many will tend to the view that this is an area where the judges must defer to the Legislature and law reform bodies. The fact that the Singapore government has announced that it intends to enact a data protection law by early 2012 is clear evidence that the Government recognises the importance of individual rights over stored data.[104] Data protection legislation aside, questions (overlapping) that are likely to arise for consideration of the courts, Parliament (and Singapore society at large) include the following:

(a) Will the common law tort of harassment be confirmed and entrenched into Singapore law so as to broaden protection for spatial privacy?

(b) Is there a pressing social need in the Singapore context to develop the law of confidence to better protect private/personal facts?[105]

Call" registry for telephone numbers and opt out of marketing phone calls, SMS/MMS and faxes. At the date of writing, it is not intended to cover e-mails as these can be dealt with by e-mail filters, the Spam Control Act and the Computer Misuse Act (Cap 50A, 2007 Rev Ed).

104 See Singapore Hansard. Notice Paper No 9 of 2011 (14 February 2011) Question No 683 for Written Answer:

> The Government will be introducing a data protection law that will provide a baseline standard for data protection in Singapore. The proposed law is intended to curb excessive and unnecessary collection of individuals' personal data by businesses, and include requirements such as obtaining the consent of individuals to disclose their personal information. It will also enhance Singapore's overall competitiveness and strengthen our position as a trusted hub for businesses and a choice location for global data management and processing services.

English experience suggests that even if Singapore has a Data Protection Act that there will still be a need to consider a parallel common law/equitable action to protect private/personal facts. A public consultation was issued by the Ministry of Information, Communication and the Arts in September 2011. The Consultation Paper explains that the proposal is to define personal data as meaning "information about an identified or identifiable individual". See <http://www.mica.gov.sg/DPConsultation/DP_Public_Consultation_Paper.pdf> (accessed 1 October 2011).

105 This question inevitably is tied up with the issue as to how broadly Singapore courts will apply the public interest defence especially in the context of the private lives of role models and public figures. One view is that Singapore society (at least in the case of political figures) takes the approach that the division between private and public life is not so distinct and "that what one does in one's private life may have a knock-on effect of the individual's public role". See Professor Eugene Tan (Singapore Management University Law School) quoted in a news report by Shefail Rekhi, "In Singapore, Private Life Matters in Politics" *The Sunday Times* (5 June 2011) (Singapore). In a similar vein, it is often said that many Eastern and Asian societies generally place more emphasis on communitarian values. Societal consensus on this may be a factor shaping the attitude of lawmakers and judges on public interest issues. A study of current societal attitude to privacy in Singapore

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(c) Is there any need for Singapore to develop a right based approach to privacy or will communitarian values come to the fore and highlight mediation and conciliation?

(d) If expanded protection is needed for private/personal facts, is it acceptable within the context of the Singapore legal system, for the courts to evolve the action in equity to protect confidential information so as to provide broader protection for private (as opposed to confidential) facts?[106]

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generally and in the context of the media (traditional and new media), role models and public figures (politicians, leaders of commerce, celebrities, *etc*) will be helpful and deserving of an article in its own right. For example, in the area of marital infidelity, the current Chief Executive of Hong Kong SAR, Donald Tsang has been reported as saying that adultery can be forgiven, and that where the person sincerely tells what happened, his personal view is to try to be as forgiving as possible (*The Straits Times* (25 October 2011) (Singapore)). The news report, however, states that one out of four respondents polled in Hong Kong stated that their views on a possible candidate for the post of Chief Executive had turned negative because of an admission of marital infidelity.

106 A recently published study on the development of Singapore law concludes that the last 20 years confirms the growth of local jurisprudence, and that whilst Singapore law is now more international, its courts are "careful to distinguish or not follow foreign cases where necessary". The years ahead will likely be witness to ever increasing diversity within the common law system. The DNA of the common law system will remain (the rule of law, doctrine of precedent, case law development, legal reasoning, *etc*). For an empirical study, see Goh Yihan & Paul Tan, "An Empirical Study of the Development of Singapore Law" (2011) 23 SAcLJ 176 at 225. See also the remarks by Baroness Hale at Barnard's Inn Reading 2011 on evolutionary development of the common law in the context of the European Court of Human Rights. Whilst recognising the power of judges to develop legal principles, Baroness Hale makes the point that limits include the fact that there are some things which are better left to Parliament.

> This is not so much because we defer to Parliament, still less that that they are more democratic than we are – the courts are just as essential to a democracy based on a rule of law as is Parliament. It is rather a question of institutional competence. The courts can develop and adapt within existing concepts and principles … On the other hand the courts cannot engage in empirical research or conduct opinion polls so that there may be dangers in departing from a long-established rule of the common law without a better empirical base than we have.

See <http://www.supremecourt.gov.uk/docs/speech_110616.pdf> (accessed 1 October 2011). The development of a general tort of privacy out of existing causes of action: nuisance, intentional/reckless infliction of psychiatric harm, assault, battery and the action in equity to protect confidential information will greatly test the boundary between evolutionary development and judicial law making. That said, a principled expansion of the scope/type of information that can be protected by the law of confidential information so as to provide better protection for private/personal facts may fall within the zone of evolutionary judicial development of the law.

(e) If the action is developed judicially to protect private facts will the action remain rooted in equity or will the action be treated as a modern off shoot of tort law?

(f) What will the relationship be between any judge-crafted action to protect private facts and the proposed consumer data protection legislation that is anticipated for 2012?[107]

(g) Given that Singapore has already decided to bolster self-regulation and voluntary codes of conduct in respect of data protection rules, is there a case for saying that outside of data protection legislation and the existing law of confidence, self-regulation by the news and media industry in Singapore is adequate at least for the time being?

(h) Aside from substantive principles as to what constitutes protectable private/personal facts in any developed action, what are the applicable rules of causation and remoteness of damage, and will there be an onus on the claimant to take reasonable steps to mitigate injury?[108]

(i) What approach will Singapore take in developing the public interest defence in respect of any margin of appreciation to be afforded to journalists over the scope of information to be disclosed?

(j) Aside from public interest defence, will there be a principle of contributory negligence such as to affect damages awards?

(k) Aside from compensatory damages, will there be a power to award aggravated damages and if so to what extent can the court take account of pre-publication conduct such as a

107 Note that whilst it is unlikely that Singapore courts will develop a general tort of privacy, the existing action in equity (as mentioned already) is already capable of protecting personal information that possesses the quality of confidence. The need to establish a pre-existing obligation or relationship of confidence has already been lessened by case law even in cases where the action concerns industrial espionage and commercial trade secrets. Even if the courts are prepared to evolve and develop the action in equity in the area of private facts – data protection legislation is still important for the certainty that it provides within the scope of its coverage. It is also noted that the proposed definition of personal data is not necessarily the same as personal information that possesses the quality of confidence or privacy. For the avoidance of doubt an express provision that the new legislation does not prejudice any other right or cause of action (statutory or otherwise) will be helpful. Detailed commentary on the relationship between the new legislation and the action in equity to protect confidential personal information is best addressed after the legislation is passed by Parliament.

108 See G Wei, "Breach of Confidence, Downstream Losses, Gains and Remedies" [2005] Sing JLS 20.

failure (deliberate or otherwise) to pre-notify the target of the impending publication?

(l) Will Singapore revisit the question of availability of exemplary damages especially given the view that compensatory damages will not be able to provide much more than a degree of vindication and *solatium* where private facts have been revealed?

(m) Given the difficulties in assessing compensatory damages in actions concerning private/personal facts, is there a case for a scheme of statutory damages?[109]

(n) If the action to protect private facts is developed in Singapore and remains rooted in equity, is it to be accepted that the remedy of an account of profits is available – at least on a discretionary basis?

(o) Aside from final remedies, is there a need to modify applicable principles on the grant of interlocutory relief in privacy cases so as to raise the threshold in the light of freedom of expression and the public interest?[110]

(p) Given the need to provide effective remedies to safeguard existing and any new legal interest in private/personal facts, what will be the approach of the Singapore courts to requests for anonymisation orders, super-injunctions and hyper-injunctions?[111] The *Mosley* case demonstrates that where

109 Statutory damages are now available in actions for copyright infringement in Singapore on account of problems of assessing loss.

110 Consider, for example, whether application of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 is appropriate where an interim injunction is sought to prevent publication of private facts in circumstances where a public interest exception may arise. The *American Cyanamid* guidelines are not immutable and a case for a higher threshold standard of assurance may be needed especially if Singapore does develop an action to provide more protection for private facts. See G Wei, "Milky Way and Andromeda: Privacy, Confidentiality and Freedom of Expression" (2006) 18 SAcLJ 1 at paras 29–43.

111 Whilst judicial proceedings are generally open and in public, s 8(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") provides that the court has the power to hear any matter or proceeding (in whole or in part) *in camera* if the court is satisfied that it is expedient in the interests of justice, public safety, public security or propriety or for any other sufficient reason. Section 8(2A) sets out further provisions providing for anonymity of witnesses. Where proceedings are heard *in camera*, O 42 r 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) provides that any judgment pronounced or delivered in such proceedings shall not be available for public inspection except that the court may, on such terms as it may impose, allow an inspection of such judgment by, or a copy thereof to be furnished to, a person who is not a party to the proceedings. Note that O 42 r 2 on its face sets out a complete prohibition. No reference is made to redaction of parts of the judgment where the proceedings are heard *in camera*. Compare and contrast s 22 of the International Arbitration Act (Cap 143A, 1995 Rev Ed) ("IAA"). This

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the legal interest violated is the right to privacy, paradise once lost, can never be regained. But, does it follow that the law can and should do more to protect an individual from a threatened loss of privacy in respect of private facts?[112] Aside from the practicality of a duty to pre-notify, law makers (judicial or legislative) will need to consider carefully the impact of such a duty on other public interests.[113]

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states that proceedings under the IAA in any court shall on the application of any party be heard otherwise than in open court. In such cases, s 23 gives the court power to issue directions as to whether and if so what information may be published. The court may (broadly) allow publication where (a) all the parties agree or (b) the publication of the information in question in accordance with the directions will not reveal any information which a party reasonably wishes to remain confidential or (c) the judgment is of major legal interest. For a discussion of the relationship between proceedings heard *in camera* under s 8(2) of the SCJA and in open under s 22 of the IAA, see *AAY v AAZ* [2011] 2 SLR 528 where the court allowed a redacted version of a judgment to be published that arose in connection with arbitration proceedings. At present, it appears that where a court orders proceedings to be heard *in camera* under the SCJA, there is no power to allow publication of a suitably redacted judgment. In cases where the proceedings are heard in court in open and in the public, the Singapore court has on occasion provided for redaction (for example to safeguard confidential information). It is submitted that redaction in such cases, in the interests of justice, is within the inherent power of the court. See O 92 r 4 of the Rules of Court. Note that so far as anonymity is concerned, ss 8(2A) and 8(3) set out provisions to protect the identity of witnesses. Other statutes providing for anonymity include the Children and Young Persons Act (Cap 38 2001 Rev Ed). Leaving aside special cases such as arbitration there is no doubt that the general principle of open justice applies in Singapore. Even if Singapore does develop an action to protect private (personally sensitive facts), it does not follow that the proceedings must be in private or that anonymity is always necessary. In some cases, it may be that a balance can be achieved by redacting the details of personally sensitive information whilst allowing the reporting of the bare facts, for example, that the claimant is alleged to have had a relationship with B. Applications to hear proceedings *in camera* or for redaction of information in a judgment arising out of an open hearing are always fact sensitive.

112 Leaving aside the controversy over a mandatory duty to pre-notify, is there a case for arguing that a failure to pre-notify (at least in circumstances where it would be reasonable to do so bearing in mind industry standards) is a factor that can be taken account of in awarding/assessing damages: compensatory (distress) and exemplary (assuming that a power to award exemplary damages is developed). On the utility of current law and practice *viz* grant of interim injunctive relief to protect the private facts and identities of "celebrities" or well-known claimants, given the practical reality of likely publication on the Internet, the view has been expressed by some claimants (as reported in the popular press) that injunctive relief (especially anonymisation) is pointless and that it is better to "fight" the matter in the public. This throws a spot light on financial remedies.

113 See also n 110 above and the grant of interlocutory restraining orders. Whilst the application will sometimes be made on an *ex parte* basis, tensions can arise with freedom of expression and the public interest if interlocutory relief is granted too readily. Whilst in some, possibly many cases, injury caused by the publication of private information cannot be compensated adequately by an award of damages, it

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(q) To what extent will Singapore courts evolve the jurisdiction to grant injunctive relief (interim and/or final) on a *contra mundum* basis? In England, the power is no longer thought to depend on the court's inherent jurisdiction to control its own procedures. Instead it is now thought to flow from the need to balance competing rights of privacy and freedom of expression as is required by the Human Rights Act 1998 and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Singapore is not bound by an equivalent to the Convention. That said its courts have in the past been prepared to develop "novel" procedural devices through the inherent jurisdiction pathway. Space constraints do not, however, permit a fuller analysis of this important point.

50 There are bound to be other issues and questions as Singapore, like so many other countries, struggles to keep its laws, legal procedures and remedies up to date in the light of technological developments and new media.[114] If a right to protect private/personal facts is recognised (especially over and above what is already achievable under the existing law of confidence) it makes sense that effective, practical, proportional remedies and procedures be developed to safeguard the interest of the claimant as well as the interests of society as a whole including media and news interests. Data protection legislation is one step. The question that remains is the extent, if at all, it is necessary in Singapore to develop the action in breach of confidence to provide more protection for private facts and if so whether adjustments are needed to the armoury of remedial responses.

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cannot be assumed that this will always be the position. See, for example, *John Terry v Persons Unknown* [2010] EWHC 119 (QB) at [127] and [149] (ii) that even if the court was satisfied that the claimant was likely to obtain an injunction at trial, that the adverse consequences were not on the facts particularly grave and that damages may be an adequate remedy. Exercise of discretion involved a matter of proportionality. Damages would be an adequate remedy especially if the real concern of the applicant was to protect his sponsorship business.

114 The author has discussed some of these questions elsewhere. See in particular G Wei, "Milky Way and Andromeda: Privacy, Confidentiality and Freedom of Expression" (2006) 18 SAcLJ 1 and G Wei, "Breach of Confidence, Downstream Losses, Gains and Remedies" [2005] Sing JLS 20.