

Fickle Justice: Judicial Idiosyncrasy in UK Privacy Cases

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I. INTRODUCTION

In 1990, the Federal Court of Australia rejected counsel's submission that English authorities on the "public interest" defense in breach of confidence claims ought to be adopted. The court dismissively described those authorities as "not so much a rule of law as an invitation to judicial idiosyncrasy."¹ The same comment seems equally applicable today. As is well-established in British common law, when deciding claims for misuse of private information (which replaces breach of confidence),² the court must decide whether the claimant's reasonable expectation of privacy is outweighed by the contribution to a debate of public interest that the publication makes.³ As the case law shows, this is usually a delicate balance that may involve fine distinctions. Yet despite judicial recognition that the "applicable principles [should] be stated with reasonable clarity"⁴ so as to avoid accusations of judicial idiosyncrasy, the approach taken to determining the question of "public interest" remains an invitation to such, especially where celebrities' private lives are involved. Recent developments suggest broad diversity in the methodology of evaluating the worth of privacy-invading expression in which both skeptical and generous approaches are evident.

These idiosyncratic factors are the subject of discussion in this Article.⁵ By examining the recent case law, it will be argued that since the public interest test pervades a range of measures relating to the misuse of private information tort, the issue of judicial idiosyncrasy must be addressed by an appellate court. The adoption of the skeptical approach as

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¹ *Smith Kline & French Labs. (Austl.) Ltd. v. Sec'y to the Dep't of Cmty. Servs. & Health* (1990) 22 FCR 73, 111.

² *Douglas v. Hello Ltd.*, [2005] EWCA (Civ) 595, [2006] QB 125, [53] (appeal taken from Eng.).

³ *Von Hannover v. Germany*, 2004-VI Eur. Ct. H. R. 41; *Campbell v. MGN Ltd.*, [2004] UKHL 22, [2004] 2 A.C. 457 [134]–[140] (appeal taken from Eng.); *In re S (FC) (a child)* [2004] UKHL 47, [2005] 1 A.C. 593 [17] (appeal taken from Eng.).

⁴ *McKennitt v. Ash*, [2005] EWHC 3003 (QB), [2006] All E.R. (D) 02, [101].

⁵ This Article develops some of the themes that this Author discussed more extensively in an earlier publication. See generally Paul Wragg, *A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after Mosley and Terry*, 2 J. MEDIA L. 295 (2010).

the standard is more in keeping with both previous UK and Strasbourg decisions and, moreover, that recent Court of Appeal decisions offer some support for its adoption.

II. RECENT DEVELOPMENTS

The UK historically lacked a legal mechanism to protect privacy in the absence of a pre-existing confidential relationship between the parties.⁶ The commonly accepted low point of this lacuna was the decision in *Kaye v. Robertson*, where a sympathetic Court of Appeal was unable to provide a meaningful remedy to actor Gordon Kaye in his claim against the *Sunday Sport*, a tabloid newspaper. Whilst recovering in a private hospital room shortly after extensive brain surgery (debris from a wooden billboard had fallen through his car windscreen while driving in a storm), a journalist and photographer entered, took photos, and proceeded to conduct an interview with Kaye despite him being in no fit state to consent.⁷ The introduction of the Human Rights Act 1998 (HRA) has dramatically improved matters by allowing claimants to pursue claims for breach of Article 8 of the European Convention on Human Rights (ECHR), the right to respect for family and private life, in UK courts rather than having to go to the European Court of Human Rights (hereinafter “ECtHR”) in Strasbourg. Although there is no overarching privacy tort as such,⁸ the old breach of confidence claim, renamed as the misuse of private information tort, has been modified so that, amongst other things, there is no need to demonstrate that a pre-existing confidential relationship exists.⁹ The reported case law predominantly concerns situations where newspapers have published, or wish to publish, privacy-invading stories about public figures and celebrities. According to the House of Lords¹⁰ decisions in *Campbell v. MGN Ltd*¹¹ and *In re S*,¹² in order to succeed, a claimant must establish that the critical information raises a reasonable expectation of privacy, and,

⁶ See generally HELEN FENWICK & GAVIN PHILLIPSON, MEDIA FREEDOM UNDER THE HUMAN RIGHTS ACT (2006); STEPHEN H. BAILEY & NICK TAYLOR, CIVIL LIBERTIES, CASES, MATERIALS AND COMMENTARY, (6th ed. 2009).

⁷ *Kaye v. Robertson*, [1991] FSR 62, 63 (Eng.).

⁸ *Wainwright v. Home Office* [2003] UKHL 53, [2004] 2 A.C. 406, [15]–[19] (appeal taken from Eng.).

⁹ See Sir David Eady, *Injunctions and the Protection of Privacy*, 29 CIV. JUST. Q. 411 (2010), for a full discussion on the differences between the old breach of confidence test and the misuse of private information tort.

¹⁰ The House of Lords was replaced by the Supreme Court in October 2009 as the final court of appeal in the UK. Jo Lennon, *A Supreme Court for the United Kingdom: A Note on Early Days*, 29 CIV. JUST. Q. 139, 139 (2010).

¹¹ *Campbell v. MGN Ltd*. [2004] UKHL 22, [2004] 2 A.C. 457 (appeal taken from Eng.).

¹² *In re S* (FC) (a child) [2004] UKHL 47, [2004] 1 A.C. 593 (appeal taken from Eng.).

once established, the court must decide whether the public interest in publication of that information nevertheless outweighs the privacy claim. This “new methodology” received approval from the ECtHR in January 2011 in a decision against MGN Ltd. (who was appealing against the decision in *Campbell*)¹³ and is consistent with the ECtHR decision in *Von Hannover*.¹⁴

From a United States perspective, probably the most striking feature of the process is that neither Article 8 nor the newspaper’s Article 10 right to freedom of expression has priority. Thus, once the claimant establishes that the critical information attracts a reasonable expectation of privacy,¹⁵ the court must decide upon the relative weight of the claims by determining the extent to which the competing values that underpin the two rights are at stake. For freedom of expression, it is well-established in the Strasbourg jurisprudence that the democratic process value animates the right.¹⁶ This step calls for intensive review of the specific facts, a process in which “generalities can never provide the complete answer.”¹⁷ There have been several decisions over the past year, discussed below, that have provided some much needed clarity and guidance on the finer points of this balancing process.

In determining the strength of the privacy claim, it has long been argued in academic literature that an individual ought to retain informational autonomy or control over disclosure of information relating to his or her private life, and, therefore, previous disclosures do not undermine the present claim.¹⁸ This argument appears to have been at least partially recognized by the Court of Appeal in *Ntuli v. Donald*,¹⁹ in which the claimant appealed against an injunction that prevented her from selling her “kiss and tell” story of a failed sexual relationship with Howard Donald of the British pop group Take That to the *News of the World*. Ntuli had argued that since some of Donald’s other relationships had received media

¹³ MGN Ltd. v. United Kingdom, App. No. 39401/04 (Eur. Ct. H.R. Jan. 18, 2011) available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=39401/04&sessionid=68963643&skin=hudoc-en> (search using application number). Although MGN Ltd. was successful in its alternative claim that the recoverability of substantial success fees disproportionately interfered with its freedom of expression under Article 10. *Id.* at ¶¶ 218–20.

¹⁴ See *infra* notes 38–41 and accompanying text.

¹⁵ If the claimant cannot then the claim fails and, thus, the merits of the free speech claims are not explored. See *John v. Associated Newspapers Ltd.* [2006] EWHC 1611 (QB), [13]–[20].

¹⁶ See, e.g., *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (1976); *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (1979); *Lingens v. Austria*, 103 Eur. Ct. H.R. (1986); *Jersild v. Denmark*, App. No. 15890/8, 19 Eur. H.R. Rep. 1 (1994); *Bladet Tromsø v. Norway*, 1999-III Eur. Ct. H.R. 289.

¹⁷ Eady *supra*, note 9, at 418.

¹⁸ See FENWICK & PHILLIPSON, *supra* note 6, at 662–666.

¹⁹ [2010] EWCA (Civ) 1276, [2011] 3 W.L.R. 294 (Eng).

coverage, and since he had been open about his previous sexual conduct, no significant damage was likely to occur to his family and private life from publication. Rejecting this argument, the Court of Appeal endorsed Mr. Justice Eady's reasoning at first instance that although "admissions as to his past behaviour" were to be taken into account, they were not "a determinative factor or anything like it," and so the intimate details of the relationship remained secret.²⁰

Donald was unsuccessful, however, in persuading the court that his application for a super-injunction should have been successful. With the controversial nature of super-injunctions clearly in mind,²¹ the court was not convinced that the mere disclosure of the fact of relationship carried sufficiently grave adverse consequences, not least because it was "not entirely secret"; so, there was "no urgency in respect of this disclosure, nor [was] there a compelling reason to restrain it."²² The use of super-injunctions and orders for anonymity, in which proceedings are reported without revealing the identities of a party or parties, is currently a matter of popular and political interest.²³ As the Court of Appeal has recently reiterated,²⁴ any order for anonymity is an interference with the principle of open justice and Article 10 and so must be justified.²⁵ In order to succeed, the claimant must establish that naming the parties would defeat the purpose of the injunction.²⁶

*CDE v. MGN Ltd.*²⁷ is a recent example in which the claimant succeeded with this argument. In this case, the claimants were husband and wife, with the husband described in broad terms as someone who often appears on television. The husband had exchanged intimate messages with the second defendant over a period of time, and although there had been no

²⁰ *Id.* at [24].

²¹ With respect to super-injunctions, not even the existence of the injunction let alone the parties to it can be publicly disclosed—something which has obvious implications for the principle of open justice. See, e.g., Sophie Matthiesson, *Who's Afraid of the Limelight? The Trafigura and Terry Super-Injunctions, and the Subsequent Fallout* 2, J. MEDIA L. 153 (2010).

²² *Ntuli v. Donald*, [2010] EWCA (Civ) 1276, [38].

²³ A committee to examine the issues surrounding the use of injunctions and super-injunctions was established in April 2010. The Committee is yet to announce its findings. Press Release, Committee to examine 'super-injunctions,' Judicial Communications Office (Apr. 6, 2010), http://old.judiciary.gov.uk/publications_media/media_releases/2010/1510.htm.

²⁴ *JIH v. News Grp. Newspapers Ltd.*, [2011] EWCA (Civ) 42 (Eng.).

²⁵ The importance of open justice is well-established. See, e.g., *Scott v. Scott*, [1913] A.C. 417 (H.L.) (appeal taken from Eng.); *Attorney-General v. Leveller Magazine Ltd.*, [1979] A.C. 440 (H.L.) (appeal taken from Eng.).

²⁶ *Ntuli v. Donald*, [2010] EWCA (Civ) 1276 [55]–[56]; *JIH v. News Grp. Newspapers Ltd.*, [2011] EWCA (Civ) [39]–[41].

²⁷ [2010] EWHC 3308 (QB), [76].

sexual congress, a tabloid newspaper—the *Sunday Mirror*—had persuaded the second defendant to sell her story. In granting the order for injunctive relief and anonymity, Mr. Justice Eady placed significance upon the fact that the claimants closely guarded their private lives and also took into account the Article 8 interests of their teenage children.²⁸ He concluded that not only would revealing the identities of the parties defeat the purpose of a trial, but also that open justice was not unduly threatened since the reasoning of the court was sufficiently transparent.²⁹ However, as the Court of Appeal in *JIH v. News Group Newspapers Ltd.* has recently reiterated, the question of whether the parties' identities should remain anonymous is a matter for the courts to decide, not the parties: "[A]n order for anonymity and reporting restrictions cannot be made simply because the parties consent: parties cannot waive the rights of the public."³⁰ Indeed, in *JIH*, the Court of Appeal set out, at length, the factors that must be taken into account in deciding whether to grant anonymity, including whether there is any less restrictive or more acceptable alternative to that sought. It also opined that public figures or celebrities should not be given special treatment.³¹ The inclusion of the latter, presumably, is a fillip to the popular press, since the point is otherwise self-evident.³²

In determining the public interest in privacy-invading expression, various approaches to the concept of public interest are apparent in the case law, with the high point for the media being the Court of Appeal decision in *A v. B Plc.*³³ There, a Premiership footballer's application for injunctive relief against publication of his extra-marital affair with two lap-dancers failed on the basis that he was a role model and therefore a "legitimate subject of public attention,"³⁴ specifically because "footballers are role models for young people and undesirable behavior on their part can set an unfortunate example."³⁵ In the later leading case of *Campbell*, Baroness Hale adopted a more pragmatic approach, which recognized that:

²⁸ *Id.* at [85].

²⁹ *Id.* at [76], [86].

³⁰ *JIH v. News Grp. Newspapers Ltd.*, [2011] EWCA (Civ) 42, [12].

³¹ *Id.* at [21].

³² See Paul Dacre, *A Threat to Our Press*, THE GUARDIAN, Nov. 10, 2008, <http://www.guardian.co.uk/media/2008/nov/10/paul-dacre-press-threats> for the peculiar outburst of Paul Dacre, editor of *The Daily Mail*, in an article in *The Guardian*, in which he essentially brands privacy law developments as draconian measures imposed by unaccountable judges for the benefit of the rich and famous to the detriment of the ordinary citizen and the continued survival of the press.

³³ [2002] EWCA (Civ) 337, [2003] Q.B. 195.

³⁴ *Id.* at [11].

³⁵ *Id.* at [43].

[T]here are undoubtedly different types of speech . . . some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organization of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons...But it is difficult to make such claims on behalf of the publication with which we are concerned here. The political and social life of the community . . . [is] not obviously assisted by pouring over the intimate details of a fashion model's private life.³⁶

In a later House of Lords decision, Baroness Hale expanded on this view to say, more decisively, that "a real public interest . . . [is] very different from saying that it is information which interests the public – the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one [sic] could claim any real public interest in our being told all about it."³⁷

This approach is consistent with that taken by the ECtHR in *Von Hannover v. Germany*,³⁸ where, in stating that the decisive factor is whether the expression contributes to a debate of general interest,³⁹ the Court explained:

[A] fundamental distinction needs to be made between reporting facts . . . capable of contributing to a debate in a democratic society . . . and reporting details of the private life of an individual who . . . does not exercise official

³⁶ *Campbell v. MGN Ltd.* [2004] UKHL 22, [2004] 2 A.C. 457(H.L.), [148]–[149] (appeal taken from Eng.).

³⁷ *Jameel v. Wall St. J. Eur. Sprl.*, [2006] UKHL 44, [2007], 1 A.C. 359 (H.L.) [147] (appeal taken from Eng.).

³⁸ *Von Hannover v. Germany*, 2004-VI Eur. Ct. H. R. 41.

³⁹ *Id.* at [76].

functions. While in the former case the press exercises its vital role of “watchdog” in a democracy by contributing to “impart[ing] information and ideas on a matter of public interest, [sic] it does not do so in the latter case In these conditions freedom of expression calls for a narrower interpretation.”⁴⁰

Thus, “publication[s] . . . the sole purpose of which [are] to satisfy the curiosity of a particular readership regarding the details of the applicant’s private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public.”⁴¹

The UK courts have interpreted the instruction in Section 2 of the HRA that they as requiring that they “take into account” Strasbourg jurisprudence when determining cases involving Convention rights as an obligation to “keep pace” with the ECtHR case law.⁴² As the UK Supreme Court⁴³ recognized explicitly in *In re Guardian News and Media Ltd*,⁴⁴ *Von Hannover* is the leading decision concerning the privacy/free speech dichotomy. However, as the Supreme Court in *In re Guardian* also recognized, the ECtHR has stated that where the publication does concern a question of public interest, there is “scarcely . . . any room for restrictions on freedom of expression.”⁴⁵ In the recent decision in *Terry v. Persons Unknown*,⁴⁶ in which the application by a Premiership footballer, John Terry, to prevent the publication of a “kiss and tell” story failed, Mr. Justice Tugendhat offered a novel interpretation of the concept of public interest. He suggested that there is a conceivable public interest in discussing the private lives of public figures (including celebrities) because in a plural society, there exists a “freedom to criticize . . . the conduct of other members of society as being socially harmful, or wrong . . . [since] [i]t is as a result of public discussion and debate, that public opinion

⁴⁰ *Id.* at [70] (citations omitted).

⁴¹ *Id.* at [65].

⁴² Human Rights Act, 1998, c. 42, § 2(1)(a), available at <http://www.legislation.gov.uk/ukpga/1998/42/section/2>; Regina v. Special Adjudicator, [2004] UKHL 26, [2004] 2 A.C. 323 (H.L.) [20] (appeal taken from Eng.).

⁴³ See *supra* note 10.

⁴⁴ [2010] UKSC 1, [2010] 2 All E.R. 799 (S.C.) [48] (appeal taken from Eng.).

⁴⁵ *Id.* at [51] (citing *Petrina v. Romania*, App. No. 78060/01 (Eur. Ct. H.R. Oct. 14, 2008) available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=39401/04&sessionId=68963643&skin=hudoc-en> (search using application number) (the cited opinion is available in French only, however the UK Supreme Court has translated the pertinent text in its opinion to English).

⁴⁶ [2010] EWHC (QB) 119.

develops.”⁴⁷ This generous approach seems to conflict with Mr. Justice Eady’s recent assessment that “it would be unusual for a genuine public interest to [exist] in the context of ‘kiss and tell.’”⁴⁸ As noted, Mr. Justice Eady decided for the claimants in *Ntuli v. Donald*⁴⁹ (at first instance) and *CDE v. MGN Ltd.*⁵⁰ As discussed below, this difference of approach to the question of public interest raises issues of judicial idiosyncrasy.

In keeping with the skeptical approach to privacy-invading expression that has become the hallmark of his judgments, Mr. Justice Eady has also recently stated that, when determining the strength of the free speech claim, the fact that the critical information is of public interest because the public figure’s conduct amounts to a technical breach of the criminal law⁵¹ does not mean exposure is legitimate; the interference with Article 8 must be proportionate.⁵² Likewise, in the same decision, he also had cause to remind the defendant newspaper that in “kiss and tell” stories, there is no absolute right on the part of the informer to ‘tell their story’; the Article 10 rights of the informer are simply a factor to be taken into account in the balancing process.⁵³ Furthermore, the defendant newspaper’s formulation of the public interest element is not decisive; it is for the court to determine whether the facts constitute a legitimate public interest and to what extent⁵⁴ “it cannot be a trump card that one or more of the Defendants have been able to think up an interpretation of the facts, in hindsight, which happens to provide the makings of a public interest argument.”⁵⁵

From these recent developments, several points of debate have arisen. Perhaps the most prevalent in the academic literature centers on remedies for actual or intended invasion of privacy. In particular, whether damages are an adequate remedy⁵⁶ and whether, instead, injunctive relief ought to be

⁴⁷ *Id.* at [104].

⁴⁸ Eady, *supra* note 9, at 424.

⁴⁹ *Ntuli v. Donald*, [2010] EWCA (Civ) 1276.

⁵⁰ *CDE v. MGN Ltd.*, [2010] EWHC (QB) 3308.

⁵¹ See *Mosley v. News Grp. Newspapers Ltd.*, [2008] EWHC (QB) 1777, [113]–[119]; *CDE*, [2010] EWHC (QB) 3308 at [45]–[46].

⁵² *CDE*, [2010] EWHC (QB) 3308, at [40].

⁵³ See, e.g., *id.* at [59]; *Von Hannover v. Germany*, 2004-VI Eur. Ct. H. R. 41, [58]; *Ash v. McKennitt*, [2006] EWCA (Civ) 1714, [50]–[52], [2008] Q.B. 73 [50]–[52].

⁵⁴ *MGN Ltd. v. United Kingdom*, App. No. 39401/04, ¶ 17 (Eur. Ct. H.R. Jan. 18, 2011) available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=39401/04&sessionid=68963643&skin=hudoc-en>.

⁵⁵ *CDE* [2010] EWHC (QB) 3308 at [51].

⁵⁶ Eady, *supra* note 9, at 413, 423; Andrew Scott, *Prior Notification in Privacy Cases: A Reply to Professor Phillipson*, 2 J. MEDIA L. 49, 50 (2010); John Hartshorne, *The Value of Privacy*, 2 J. MEDIA L. 67 (2010); Normann Witzleb, *Justifying Gain-based Remedies for Invasions of Privacy*, 29 OXFORD J.L.S. 325, 325–26 (2009).

more freely available.⁵⁷ The focal point of this Article, however, is the court's interpretation of the term "public interest" in the context of privacy cases. In the following section, it will be argued that the judiciary is yet to adopt a settled approach to this issue.

III. DISCUSSION

In order to frame the discussion on the concept of "public interest" within the privacy case law, the limited role that the appellate courts now play in the misuse of private information claims should be acknowledged. In a recent article, Sir David Eady, writing extra-judicially, offers a fascinating insight into the balancing process from a judicial perspective and states that the Court of Appeal is "unlikely to interfere" with the first instance decision so long as the judge has asked "the right questions—and, it has to be said, the questions to be asked are so straightforward that it would be quite difficult to get them wrong. The buck therefore tends to stop with the individual judge hearing the case."⁵⁸ Indeed, in its most recent decision on privacy in *JIH v. News Group Newspapers Ltd*,⁵⁹ the Court of Appeal had cause to expressly state the point that appellate courts should be "slow to interfere" unless it is shown that the first instance judge was "wrong."⁶⁰ Of course, the prospect that different judges could conceivably reach different decisions on the same set of facts is no cause for concern. It is trite to say that this is an inevitable possibility in law. Likewise, since the factual matrix will vary from case to case it may be unhelpful to compare some cases to others.

This leads Eady to conclude that "[b]ecause such circumstances inevitably differ from one case to another, almost infinitely, privacy watchers should not be too ready to infer inconsistencies or changes in the law with every case that comes along."⁶¹ This may have been what the Court of Appeal was referring to when it obliquely observed, without further explanation, that the balancing process involves "a significant degree of subjectivity."⁶² However, a difference in approach to the application of facts to the law is one thing but a difference in approach to

⁵⁷ Gavin Phillipson, *Max Mosley goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions*, 1 J. MEDIA L. 73 (2009); Scott, *supra* note 56; Eady, *supra* note 9; Godwin Busuttil & Patrick McCafferty, *Interim Injunctions and the Overlap between Privacy and Libel*, 2 J. MEDIA L. 1 (2010); Matthiesson, *supra* note 21; Kirsty Hughes, *No Reasonable Expectation of Anonymity?*, 2 J. MEDIA L. 169 (2010).

⁵⁸ Eady, *supra* note 9, at 419.

⁵⁹ *JIH v. News Grp. Newspapers Ltd.* [2011] EWCA (Civ) 42 (Eng.).

⁶⁰ *Id.* at [26].

⁶¹ Eady, *supra* note 9, at 419.

⁶² *JIH*, [2011] EWCA (Civ) at [3].

principles of law is another. As the Author has argued elsewhere, the judiciary does not yet seem to have settled upon a solitary approach to the concept of public interest.⁶³ This inconsistency is troubling, particularly given the admission that the appellate court plays a limited role. As is evident from the discussion above, the public interest test is pervasive throughout the misuse of private information tort in determining not only whether the claim succeeds at full trial or at the injunctive relief stage, but also in whether to grant an order for anonymity. Consequently, given the pivotal significance of the public interest test to the success of the claim, the prospect of success and the identity of the judge hearing the claim seem more interlinked than is desirable.

Arguably, there is less discussion in the case law now about the public interest concept compared to the earlier decisions. In *A v. B Plc.*,⁶⁴ Lord Woolf in the Court of Appeal placed great emphasis on the role model status of the claimant in his decision despite the fact that the claimant had not especially courted media attention nor portrayed himself as a role model in his dealings with the press. In the later decision of *McKennitt v. Ash*, a differently composed Court of Appeal expressed significant doubt as to the validity of the concept of an involuntary role model.⁶⁵ Lord Woolf also suggested in *A v. B Plc.* that the sustainability of newspapers was also significant in determining the public interest in publication—a point that has been heavily criticized in the academic commentary⁶⁶ and has not been applied in decisions since. It is also clear from the case law that what interests the public is not necessarily of public interest.⁶⁷

The diversity in approach, however, is in defining the contribution that the expression makes to a debate of public interest. As the Author has stated elsewhere, the diametrically-opposed exemplars are to be found in the decisions of Mr. Justice Eady and Mr. Justice Tugendhat, who happen to be the most senior and experienced judges hearing these types of claims.⁶⁸ Mr. Justice Eady's decisions are characterized by what may be termed a skeptical approach to the value of privacy-invading expression in which he applies the principles from *Von Hannover*⁶⁹ narrowly so as to

⁶³ See generally Wragg, *supra* note 5.

⁶⁴ *A v. B Plc.*, [2002] EWCA (Civ) 337; [2003] Q.B. 195.

⁶⁵ *Ash v. McKennitt*, [2006] EWCA (Civ) 1714, [65], [2008] Q.B. 73 [65].

⁶⁶ See FENWICK & PHILLIPSON, *supra* note 6, at 792–805.

⁶⁷ *Campbell v MGN Ltd.* [2004] UKHL 22, [2004] 2 A.C. 457 (H.L.) [137]–[138] (appeal taken from Eng.); *Jameel v. Wall St. Journal Eur. Sprl.*, [2006] UKHL 44, [2007], 1 A.C. 359 (H.L.) [31] (appeal taken from Eng. See also *Francome v. Mirror Grp. Newspapers Ltd.*, [1984] W.L.R. 892 at 898 (Eng.).

⁶⁸ See generally Wragg, *supra* note 5.

⁶⁹ See *supra* notes 39–42 and accompanying text.

effectively limit the concept of participation in democratic society to expression which concerns the use (or abuse) of public resources.⁷⁰ This approach is not only consistent with Baroness Hale's analysis in *Campbell*⁷¹ and the spirit of the Strasbourg Article 8 jurisprudence⁷² but also the works of United States free speech commentators such as Meiklejohn,⁷³ Blasi⁷⁴ and BeVier.⁷⁵ This skepticism is also evident in his recent extra-judicial comment that,

generalities can never provide the complete answer, e.g. that the particular claimant is a 'public figure' or a 'role model' and, because such a label has been attached, can expect little or no privacy; or, again, that he or she has sought publicity in the past and is for that reason to be regarded as fair game by the media.⁷⁶

By contrast, Mr. Justice Tugendhat, the newly-appointed senior libel judge, is viewed by the press, somewhat mischievously, as having "more enlightened views about media restrictions" than Mr. Justice Eady on the basis of his decisions in favor of press freedom.⁷⁷ In keeping with the motivation for this appraisal, *Terry v. Persons Unknown* suggests greater generosity to the public interest claims of privacy-invading expression.⁷⁸ In particular, the suggestion that there exists a freedom to criticize the

⁷⁰ See, e.g., *CDE v. MGN Ltd.*, [2010] EWHC (QB) 3308; *Ntuli v. Donald*, [2010] EWCA (Civ) 1276 (first instance); *Mosley v. News Grp. Newspapers Ltd.*, [2008] EWHC (QB) 1777; *CC v. AB*, [2006] EWHC (QB) 3083, [2007] Fam. 591; *Ash v. McKennitt*, [2006] EWCA (Civ) 1714, [2008] Q.B. 73 (first instance).

⁷¹ See discussion *supra* pp. 127–28.

⁷² *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 41, 67–73; *Sciacca v. Italy*, 2005-I Eur. Ct. H.R. 59, 68–69; *Reklos v. Greece*, App. No. 1234/05, ¶¶ 29–35, 43 (Eur. Ct. H.R. Apr. 15, 2009) available at <http://cmiskp.echr.coe.int/tkp197/search.asp> (search using application number).

⁷³ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 93–99 (Harper Bros, 1st ed.1948); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255, 258–59 (1961).

⁷⁴ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 528 (1977).

⁷⁵ Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 300–01 (1978).

⁷⁶ Eady, *supra* note 9, at 418.

⁷⁷ Peter Preston, *Mr Justice Tugendhat the libel judge of our dreams? Let's wait and see*, THE OBSERVER, (Sept. 19, 2010), <http://www.guardian.co.uk/media/2010/sep/19/michael-tugendhat-libel-judge>.

⁷⁸ *Terry v. Persons Unknown*, [2010] EWHC 119 (QB), [97]–[105]. Generosity to the media's claim is also apparent in the first instance decision in *JIH v. News Grp. Newspapers Ltd.*, [2010] EWHC 2818 (QB), [64]–[65], *rev'd* [2011] EWCA (Civ) 42. For further discussion, see *infra* p. 135–36.

moral behavior of others is consistent with a broader conception of the democratic process value to include social and moral issues. Employing this conception, a story about the infidelities of a Premiership footballer takes on a different perspective in which the actions of a recognizable figure conflicts with, contributes to, or otherwise reflects the moral fiber of society. In this sense, public scrutiny of a particular individual by the media contributes to a broader discussion of general interest about morality. Such a conception of public interest reinvigorates Lord Woolf's analysis in *A v. B plc* and, given the widespread criticism of the reasoning in that decision, may not be widely embraced. In a recent article, the Author argued that this approach is not in keeping with the spirit of *Von Hannover*, yet it is not necessarily incompatible with the letter of that decision.⁷⁹ In particular, the view in *Terry* would seem to be sympathetic to an argument that a publication that exposes immoral behavior in order to criticize that behavior, be that for its effect on an impressionable audience (as in *A v. B Plc.*) or for its incompatibility with societal standards, is contributing to a debate of general interest rather than satisfying public curiosity. This approach is also consistent with the arguments expressed by, amongst others, Baker,⁸⁰ Shiffrin,⁸¹ Scanlon,⁸² Redish⁸³ and Perry⁸⁴ that the term "political speech" calls for a broader definition than the use or abuse of public resources. Allied to that view, the common theme in *Von*

⁷⁹ Wragg, *supra* note 5, at 307.

⁸⁰ C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1001-03 (1978); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 26 (1989) ("[O]nce the insight that the personal is political is fully accepted, the category of politically relevant speech could be virtually unlimited [l]ike the difference between lyric and vulgarity, the identification of politically relevant speech depends on the eyes of the beholder.").

⁸¹ See, Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1228 (1984) (arguing that there is no "squeaky-clean separation between commercial advertising and political speech.").

⁸² Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFAIRS 204, 204-06 (1972).

⁸³ See, e.g., Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 471-72 (1971); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 607-12 (1982) (arguing that narrow readings of the term "political speech" are "untenable" because the information that an individual needs in order to self-rule extends beyond such a limited range of information: "[W]hen an individual only has an indirect say in governing his life [by voting], he has a right to information that will enable him to exercise his power more effectively; but when the individual has full and total authority to make the very same decisions [affecting only himself], his right to information mysteriously vanishes.").

⁸⁴ Michael J. Perry, *Freedom of Expression: an Essay on Theory and Doctrine* 78 NW. U. L. REV. 1137, 1151-51 (1984) (arguing that protected expression must include that which captures a "moral vision" and that this category is necessarily broader than the process conception of information and ideas useful for the evaluation of public policy and performance).

Hannover,⁸⁵ *McKennitt v. Ash*⁸⁶ and *Campbell*⁸⁷ is that the claimant was not being exposed for engaging in disreputable behavior,⁸⁸ and therefore, a distinction (albeit, arguably, a tentative one) may be made on that basis.

However, it is submitted that this argument is not without its difficulties. In particular, it makes little or no allowance for the view in *Von Hannover*⁸⁹ that the concept of freedom of expression calls for a “narrower interpretation,”⁹⁰ where individuals who do not exercise an official function (or are not exercising such) are involved.⁹¹ Such a refinement to the concept of public figure captures a narrower range of individuals and, in particular, essentially confines the list to those using public resources. To neglect this principle would be to diverge from the Strasbourg jurisprudence and, therefore, not “keep pace” with it.⁹² Likewise, the statement in *In re Guardian*—that where a public interest is involved there is “scarcely any room” for interference—ought not to be applied as a blunt instrument if a conflict with *Von Hannover* is to be avoided. As is evident from the domestic case law in *Mosley*⁹³ and *CDE v. MGN Ltd*,⁹⁴ a conceivable public interest is not a “trump card”; it is, instead, a factor to be taken into account.

Given the discrepancies between these two approaches to the public interest test, the prospect of inconsistency in future decisions is obvious. Although, by its own admission, the Court of Appeal now has a limited role to play in misuse of private information claims, it ought to grapple with this issue with a view toward implementing a standardized approach to the public interest question. On the basis of the discussion above, it is submitted that the skeptical approach represents a closer alignment with the conception of the argument from participation in a democracy articulated in the ECtHR Article 8/Article 10 case law.

Furthermore, the recent Court of Appeal decisions discussed above offer *some* support for the skeptical approach being adopted. In *JIH .v*

⁸⁵ *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 41, 69, 72–73.

⁸⁶ *McKennitt v. Ash*, [2006] EWCA (Civ) 1714, [2007] 3 W.L.R. 194, [50]–[52].

⁸⁷ *Campbell v. MGN Ltd.*, [2004] UKHL 22, [134]–[140] (appeal taken from Eng.)

⁸⁸ *Id.* The dispute surrounded photography and comment on Campbell’s attendance at drug rehabilitation meetings, which was not immoral in itself although the media’s argument was that her presence was inconsistent with her stated position on drug-taking and therefore revealed hypocrisy. It is perhaps worth recalling that the House of Lords was divided (3:2) on the outcome of the claim.

⁸⁹ *Id.*

⁹⁰ *Id.* at [66].

⁹¹ *Id.* at [63].

⁹² See *supra* pp. 129–30.

⁹³ *Mosley v. News Grp. Newspapers Ltd.*, [2008] EWHC (QB) 1777, [113]–[119].

⁹⁴ *CDE v. MGN Ltd.*, [2010] EWHC 3308 (QB), [59].

*News Group Newspapers Ltd.*⁹⁵ the Court overruled Mr. Justice Tugendhat's generous approach to deciding the anonymity order claim.⁹⁶ Given a choice between revealing the claimant's identity or the information that the claimant was seeking to keep private, Mr. Justice Tugendhat had decided in favour of the former on the basis that his identity should not be kept from the public. The Court disagreed with this reasoning. It instead concluded that the disclosure of a greater range of factual detail than could otherwise be reported was still consistent with the principle of open justice, if the identity had been revealed whilst preserving the purpose of the injunction.⁹⁷ In *Ntuli v. Donald*, the Court of Appeal endorsed Mr. Justice Eady's skeptical approach at first instance to the merits of the free speech claim by rejecting Ntuli's appeal that Mr. Justice Eady had erred by finding that there was "no reason to suppose that the revelation of the relationship would in any way contribute to a debate of general interest" based on the Strasbourg jurisprudence.⁹⁸ Lord Justice Kay refused to accept that Mr. Justice Eady, "who [was] steeped in litigation of this kind,"⁹⁹ had erred and, instead, found that "there was no analytical deficiency in the judgment."¹⁰⁰

In the alternative, a finding that a generous approach to the public interest question ought to be adopted as the standard is not necessarily fatal to the progress made in protecting privacy. Although the focus of this discussion has been on the freedom of expression argument, it should not be overlooked that the court's approach to determining the strengths of the privacy claim has softened in the past few years. In *A v. B Plc.*, the Court of Appeal refused to credit the Article 8 interests of the claimant's wife and children in deciding the balancing process, noting instead that "this is an issue on which the court is not in a position to reach a judgment."¹⁰¹ However, in *Ntuli v. Donald*, the Court of Appeal expressly approved Mr. Justice Eady's approach, at first instance, in which he included the "possible impact of publicity on the parties' respective children."¹⁰² Mr. Justice Eady adopted a similar approach in *CDE v. MGN Ltd*¹⁰³ (in which

⁹⁵ *JIH v. News Grp. Newspapers Ltd.*, [2011] EWCA (Civ) 42.

⁹⁶ *Id.* at [27]–[31].

⁹⁷ *Id.* at [32]–[41].

⁹⁸ *Ntuli v. Donald*, [2010] EWCA (Civ) 1276, [19]–[23].

⁹⁹ *Id.* at [23].

¹⁰⁰ *Id.* at [25].

¹⁰¹ Leaving aside the fact that the claimant's wife was not a party to proceedings, Lord Woolf noted "the judge should not, in our view, assume that it was in the interests of A's wife to be kept in ignorance of A's relationships." *A v. B Plc.*, [2002] EWCA (Civ) 337, [2003] Q.B. 195 [43].

¹⁰² *Ntuli*, [2010] EWCA (Civ) 1276 at [24].

¹⁰³ *CDE v. MGN Ltd.*, [2010] EWHC 3308 (QB), [6]–[7] (Eng.).

the celebrity's wife was also a claimant). This approach makes for a stronger potential privacy claim and is a welcomed development.

IV. CONCLUSION

Mr. Justice Eady has recently noted that the level of tabloid intrusion into private lives is much less than in the 1980s and 1990s, for which modifications to the law on breach of confidence are largely responsible.¹⁰⁴ From a privacy perspective, this is good news. From a freedom of expression perspective, although the media has been largely hostile to privacy law developments,¹⁰⁵ arguably such hostility is misplaced. Restrictions on privacy-invading expression where a legitimate and substantial public interest cannot be established are consistent with both free speech theory and UK/Strasbourg doctrine. It is of greater concern, however, that judicial idiosyncrasy currently dictates the approach to conceptualizing "public interest." Such diversity benefits neither the press nor "public figures" since it creates unnecessary unpredictability. This Article has argued that the appellate courts must address this discrepancy and standardize the approach to this question. In choosing between a skeptical and generous approach, it is submitted that the former is more favorable for its consistency with the Strasbourg jurisprudence. It is hoped that the much-anticipated decision in the new *Von Hannover* case, recently heard by the ECtHR,¹⁰⁶ will provide unequivocal support for this view.

POSTSCRIPT

Those keeping a close watch on privacy developments in the UK will have noticed a recent explosion in privacy-related issues dominating the headlines. The Prime Minister,¹⁰⁷ both Houses of Parliament,¹⁰⁸ and even

¹⁰⁴ Eady, *supra* note 9, at 414.

¹⁰⁵ See, e.g., Dacre, *supra* note 2; Preston, *supra* note 7.

¹⁰⁶ Press Release, Eur. Ct. of Human Rights, Hearings (Oct. 13, 2010) available at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/The+Grand+Chamber/> (follow "Press Releases" under the subtitle "Germany," then follow "2. Grand Chamber Hearing Springer v Germany and von Hannover v Germany 13_10_10").

¹⁰⁷ See Hélène Mulholland & Owen Bowcott, *Footballer's Injunction Challenged by the Sun*, GUARDIAN.CO.UK, May 23, 2011, <http://www.guardian.co.uk/politics/2011/may/23/privacy-law-social-media-cameron>.

¹⁰⁸ See Hélène Mulholland, *Ryan Giggs Named as Footballer at the Centre of Privacy Row*, GUARDIAN.CO.UK, May 23, 2011 <http://www.guardian.co.uk/politics/2011/may/23/ryan-giggs-named-footballer-injunction-row>; *High Court Lifts Sir Fred Goodwin Anonymity Injunction*, BBC NEWS, (May 19, 2011, 1:41 PM), <http://www.bbc.co.uk/news/uk-politics-13453626>.

the Duchess of Cornwall¹⁰⁹ have questioned the legitimacy of judges favoring privacy over freedom of expression. Although the discussion has generated more heat than light, it seems inevitable that more developments are in store, which may well be statutory intervention to curb the type of judicial idiosyncrasy outlined in this Article.

¹⁰⁹ See *Duchess of Cornwall Hails Freedom of Press*, THE TELEGRAPH, May 11, 2011, available at <http://www.telegraph.co.uk/news/uknews/theroyalfamily/8507831/Duchess-of-Cornwall-hails-freedom-of-press.html>