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As it is Professor Stockdale who is presiding over this evening's activities, it is especially appropriate for me to begin by paying tribute to his career, which has unusually in our jurisdiction (perhaps uniquely) enabled him to combine, at various stages, the roles of legal practitioner, judge, academic and writer on legal and historical matters. It is to be hoped that others may follow in his footsteps, since far too often we remain artificially restricted to our pre-defined categories. In other jurisdictions, particularly in the United States, there is more interaction between scholars and practitioners to their mutual advantage. We have much to learn from one another and at a time of rapid changes, both in our law and in our constitutional arrangements, it is right that we should pool our resources and exchange ideas.

It is nearly sixty years since the United Kingdom signed up to the European Convention on Human Rights and Fundamental Freedoms and thus acknowledged the rights enshrined in Articles 8 and 10 relating, on the one hand, to personal privacy and, on the other, to the freedom of expression. It was not in any sense perceived at the time as the adoption of an alien creed. Quite the contrary. A significant contribution had been made to its formulation by British lawyers. Their objectives included the crystallisation of values which had long been embedded, by one means or another, in the common law and democratic traditions of this jurisdiction.

Jack Straw pointed out on 19 May this year, in his evidence to the Select Committee on Culture, Media and Sport, that one of the principal contributors had been his distant predecessor, Sir David Maxwell-Fyfe, later Viscount Kilmuir. He had been Home Secretary under Churchill before being appointed Lord Chancellor in 1954, in which post he remained until succeeded by Lord Dilhorne on the "night of the long knives" in July 1962.

The main purpose would have been seen as the entrenching, for the benefit of others, those fundamental rights taken for granted by us and other free peoples, but which had proved more elusive in other parts of Europe under the influence of fascist dictatorships. So, ironic as it may now seem to some observers, a common perception in the early 1950s was that something of value was being exported rather than something irksome or oppressive imported.

How does it then come about in the 21st century that the influence of the Convention in general, and of Article 8 in particular, is viewed with such distaste, or at least apprehension, by so many politicians, commentators and journalists? It is seen by some as an extraneous cuckoo in the nest. It is thought to have brought with it unfamiliar restrictions that are inconsistent in some way with our democratic traditions. As is so often the case, the explanation for this paradox is multi-layered. It is perhaps at least in part due to

misconceptions as to how courts are today supposed to engage with Article 8 and partly also to a transformation, over the years, in the scope and functions of Article 8 as compared to its role when originally drafted. Although by now very familiar to those present, it may be worth recalling its exact terms, as they appear on the page, which have not in themselves been amended over the past 60 years:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

We are thus reminded of the priorities as they appeared then to the progenitors of the Convention in the aftermath of the second world war and all its inhumanities. It reflected Article 12 of the post-war Universal Declaration of Human Rights. They were obviously not concerned at that point in history with tabloid newspapers, celebrity culture or sexual indiscretions. The mischief they were having to address was the prospect of any unacceptable encroachment by the state upon the minimum personal space necessary for citizens, not only to survive, but to go further and thrive as individual human beings.

It becomes immediately apparent that expectations as to what that minimum space is, or should be, are likely to change from time to time, as society develops and the aspirations of its members evolve over generations. What was then in focus was the recognition of a very basic right for human beings, whatever their form of government, to develop as individuals and make the important personal decisions along that route, so far as possible, free from state interference or control. People were acknowledged as having freedom to make choices as to how they lived their lives (now called "lifestyle choices"), to form relationships, to have families and friends, and to communicate or associate with one another free from state scrutiny or censorship.

People were to be entitled, everywhere, to the benefit of the old maxim that an Englishman's home is his castle. It is a cliché, of course, if you happen to live in a society which has always, by one means or another, afforded legal protection for your living space – even if it only takes the form of a right to be notified of legal eviction or to be shown a search warrant. It would not have seemed, however, such a formality to those who were lucky enough to have survived the war after living under totalitarian regimes where you could be plucked from your bed and your family, by night or day, and thrust into gaol or into a concentration camp for what you happened to be or for what you believed or were suspected of believing.

No one in 1950 felt the need to protect citizens against intrusion by the press or by paparazzi. It was not a problem in any significant way. Yet, as I noted earlier, there has been a change over the years in the scope of Article 8 to cope with new forms of intrusion. That change has not been brought about by amending the Convention itself but rather in perceptions of what is now necessary and proportionate to protect the core values and interests to which Article 8 was originally directed. It is still intended to protect individual dignity and autonomy, although they are threatened sometimes in new ways and by new technological means. These changing perceptions are those of modern democratic societies and, in particular, of modern European societies, as articulated through the judges of the European Court of Human rights in Strasbourg and by the Council of Europe.

It began to emerge, for example, and especially from the 1970s onwards, that sexuality and sexual behaviour were aspects of the human personality falling within the scope of individual choice and were to be excluded from state scrutiny or control, save where it could be shown

to be strictly necessary to achieve one of the recognised social objectives originally identified. This had always been acknowledged in the case of family life, as conventionally understood, but these were aspects of human life that were now being perceived as different sides to the same coin. As the law is now being interpreted, this extension of the notion of family life, to cover a "broad church" of sexual enthusiasms, has carried with it certain ironies in the eyes of some media commentators. Adulterous and even sadistic activities are nowadays being accorded similar legal protection to that available in the case of traditional "family life".

Indeed, not that long ago, the irony seems to have been too much for the Court of Appeal to swallow in the well known case of *A v B Plc* [2003] QB 195, heard as recently as March 2002. The 'Mr A' concerned was a footballer who played for Blackburn Rovers. It came to pass that he had, when off the field, spent some quality time with two young ladies. They thought that there was some cash to be made by selling the details to the tabloid press. He then turned to the law for the protection of his privacy – somewhat optimistically as it transpired. As the Court put it at [43]:

> "[The judge below] appears to regard A as being entitled to the same protection in respect of his transient relationships with C and D as would be available to facts concerning 'sexual relations within marriage' ... Thus [the judge] states, undoubtedly correctly, that confidentiality applies to facts concerning sexual relations within marriage but then adds that 'in the context of modern sexual relations, it should be no different with relationships outside marriage'. This approach is objectionable because it makes no allowance for the very different nature of the relationship that A had, on his own account, with C and D from that which would exist within marriage. Quite apart from the recognition which the law gives to the status of marriage, there is a significant difference in our judgment between the confidentiality which attaches to what is intended to be a permanent relationship and that which attaches to the category of relationships which A was involved with here."

The Court of Appeal then referred with approval to another recent judgment at first instance in *Theakston v Mirror Group Newspapers Ltd* [2002] EWHC 137 (QB) and quoted the judge's words at [59]-[60]:

> "I consider it impossible ... to invest with the protection of confidentiality all acts of physical intimacy regardless of circumstances. I consider it artificial to draw a line at full sexual intercourse in the context of confidentiality, such that anything short of that is not confidential. Whilst the degree of intimacy is a very relevant factor, it cannot be taken in isolation from the relationship within which the physical intimacy occurs and from the other circumstances particularly the location.
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> ... Sexual relations within marriage at home would be at one end of the range or matrix of circumstances to be protected from most forms of disclosure; a one night stand with a recent acquaintance in a hotel bedroom might very well be protected from press publicity. A transitory engagement in a brothel is yet further away".

The mind did indeed begin to boggle at how such intricate jurisprudence was to be applied in practice – and particularly when a judge was confronted by an urgent application over the telephone. Where on the "scale or matrix" would the judge have to place a tent at Glastonbury or the back of a car which had run out of diesel deep in the New Forest? Since it was a relevant factor on this sliding scale to consider "the degree of intimacy" and the "location", would the law afford greater protection for a married couple in a Ford Fiesta than to a newly engaged pair in the back of a Range Rover? It seems that you might gain extra points for actually achieving what the judge called "full sexual intercourse", but have less protection from the law if a freelance photographer, panting through the forest, had managed to burst upon the scene before that stage was reached.

To some onlookers, this represented simply a valiant attempt to strike a balance between Articles 8 and 10. To others, it seemed that what we were witnessing at this intermediate period was a distant echo of pre-Enlightenment paternalism – a failure to recognise the fundamental difference between the acknowledgement of individual human rights, that require to be protected for their own sake, and on the other hand upholding the Judaeo-Christian tradition of elders or priests, or elders and betters, telling grown people how they are supposed to run their lives and withholding their privileges if they do not comply. After all, in their nature, rights are very different from privileges. If a right is infringed, the person concerned should only be denied a remedy, one would assume, if another person's countervailing right is deemed to outweigh it in the particular circumstances. In a rights based culture, it is not appropriate to refuse an injunction, or any other remedy, because of mere disapproval. It is to be seen in terms of competing Convention rights, both of which are to be accorded value as being in the public interest.

It has been recognised in subsequent Court of Appeal authority (*McKennitt v Ash* [2008] QB 73) that the *A v B* analysis is not easily to be reconciled with Strasbourg jurisprudence, and in particular with *Von Hannover v Germany* (2005) EHRR 1. There, the view was taken that intrusion upon private life can only be justified if the resulting information makes a contribution to "a debate of general interest". As it was put in the more recent case of *Leempoel v Belgium* (64772/01), 9 November 2006:

> "... publications whose sole aim is to satisfy the curiosity of a certain public as to the details of the private life of a person, whatever their fame, should not be regarded as contributing to any debate of general interest to society".

That may in itself be a somewhat elusive concept. Nonetheless, it seems now to be the nature of the activity exposed which determines whether there is a *prima facie* right to privacy – rather than the extent to which it engages the moral approval or disapproval of the individual judge. That is a theme that has been detectable, at least in Strasbourg, for many years. For example, it was said in *Dudgeon v U.K.* (1982) 4 EHRR 149 in 1982 that sexual behaviour concerns "a most intimate aspect of private life". That was concerned with the criminal law in Northern Ireland, and in particular with the offences of buggery and gross indecency. It was emphasised that there have to be serious reasons before interference in those aspects of life, on the part of the public authorities, can be justified.

Even in the notorious case of *Laskey v U.K.* (1997) 24 EHRR 39, concerning quite extreme and even dangerous examples of sadistic behaviour, the Strasbourg court proceeded on the assumption that the prosecution of these offences constituted an interference with the Article 8 rights of the participants to respect for their private lives. The only issue was whether the degree of interference could be justified as necessary and proportionate, in order to achieve one of the public policy objectives identified in Article 8(2) – such as the prevention of harm to health or morals.

At that stage, the Convention and rapidly developing Strasbourg jurisprudence only played a relatively limited role in English jurisprudence, by comparison with the position prevailing subsequently to the implementation of the Human Rights Act 1998 in October 2000. It became, nevertheless, throughout the 1980s increasingly influential in judicial reasoning in this jurisdiction. An early reference is to be found in the observations of Lord Scarman in *Att.-Gen. v BBC* [1980] AC 303, 362D. He was there concerned with the suggestion that the law of contempt might be extended to cover potentially prejudicial comments about pending proceedings before what were described as "administrative courts and tribunals" including, in that case, a valuation court set up under the General Rate Act 1967. Applying the Strasbourg test, he asked himself whether there could be said to be "a pressing social need" for an extension of the contempt jurisdiction beyond the traditionally established courts of

law, and he answered his question in the negative. He thought it relevant to pose the question in that form because in its nature the law of contempt imposes restrictions on the right of free expression under Article 10.

Some years later, the Court of Appeal in *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770 asked themselves a similar question in deciding whether it was legitimate for a local authority to sue for libel. The view was again taken that there was no such pressing need. As Balcombe LJ commented at 812-813, Article 10 could be of assistance when the common law was uncertain. (As it happened, the issue was determined later in the House of Lords on the basis of the common law rather than directly by reference to the Convention, but that is by the way.)

Because of this limited role, of assisting the courts to resolve difficulties only where the domestic law was itself uncertain, the European jurisprudence on Article 8 was not especially influential on English judges prior to the Human Rights Act. That is because the law was not in this respect uncertain. There was no law of privacy in the sense of an actionable right to pursue remedies for the revelation of personal information – save in so far as the circumstances fell within the existing law of confidence. That was reaffirmed in no uncertain terms in the well known Court of Appeal decision in *Kaye v Robertson* [1990] FSR 62. That was the case in which journalists had burst into the private hospital room of Gordon Kaye, the actor, while he was recovering from brain surgery. They then photographed him, and even purported to conduct an interview, while he was not fully aware of what was going on. In the light of the Court's conclusion on those very striking facts, European decisions could not possibly at that time justify judges in attempting to create a framework of protection going beyond that.

Some would argue that successive United Kingdom governments, up to that time, had failed to honour the international obligation undertaken in 1950 by not making adequate provision for upholding its citizens' rights under Article 8, but whether or not that was true the fact remained that Parliament had chosen on a number of occasions not to legislate. It was not for judges to fill the gap. Although the court in *Kaye v Robertson* had expressed the hope that the opportunity might soon be seized, this suggestion was not taken up despite widespread public concern in the years leading up to the point about what were perceived as "tabloid excesses". Indeed, so much was accepted by Paul Dacre of Associated Newspapers in his evidence last April before the Select Committee, although he added that the situation had improved more recently.

At all events, the position remained as it was throughout the 1990s. Any adoption of a law of privacy to address such public concerns would naturally require careful consideration of important underlying issues of public policy, as to where the balance should be struck between the rights of individuals under Article 8 and those of the media, in particular, under Article 10. The conventional approach to striking any balance between competing interests was for legislators to come to a decision after public debate. It is this notion of "balancing" which lies at the heart of my talk today: that is to say, by whom it is to be carried out and by what methodology.

The differing functions of the legislature and the judiciary, as understood a few years prior to the enactment of the Human Rights bill, were well summarised by Lord Lowry, albeit in a criminal context, in *C v DPP* [1996] 1 AC 1:

> "(1) if the solution is doubtful, the judges should beware of imposing their own remedy; (2) caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated while leaving the difficulty untouched; (3) disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems; (4) fundamental legal doctrines should not lightly be set

> aside; (5) judges should not make change unless they can achieve finality and certainty".

It might be thought that those wise words would be at least equally appropriate in the context of any proposal for judges to become involved in the tensions then existing between the press and individuals in the public eye. Indeed, all five of his indicators would be highly relevant to proposals on privacy and the press. Each of those bells would ring very loudly indeed.

Furthermore, it was by no means clear that the judiciary as a whole would have felt comfortable at that time about moving, case by case, towards a free standing right of privacy, or have welcomed the opportunity to administer such a law. That merely serves to underline how apt Lord Lowry's warning was, since this was perhaps a paradigm example of what he called a "disputed matter of social policy". Moreover, having regard to the words of Article 10 itself, any new restraints to be introduced on press freedom would have to be justified by reference to a "pressing social need in a democratic society" and be "prescribed by law". Who better to resolve such issues than those democratically elected by that society?

One line of judicial thinking in this controversial area had been voiced a few years earlier by Sir Nicolas Browne-Wilkinson during a speech in Istanbul in 1988 (at the International Press Institute Assembly). They bear repetition today:

> "I think it is extremely difficult for a legal system to apply a general concept of privacy, because it is hard to distinguish what is meant by it. ... As a legal technician, I would be unhappy dealing with a law of privacy ... It seems to me that the legal difficulties of defining what is privacy and what are the proper defences are too elaborate. The courts, I would have to say, are quite good at some things, but they are not famed for their delicacy of touch, and when you have matters which are a very delicate balancing of imponderables, where the essence of the matter is flexibility, not certainty, I believe the courts may not be the ideal body to administer it".

As one would expect, that was and remains a very cogent and telling argument. But it sounds so strange to our ears, only 20 years later, because the pass has been well and truly sold in the intervening period. Whether it *should* have been sold is a disputed matter of public and social policy. It is not for judges to express personal opinions about such matters, although it may be legitimate for me nonetheless to follow through how this came about and to try briefly to identify what have been the legal consequences – intended or otherwise.

Not long after Lord Lowry's warning in *C v DPP*, as to the need strictly to confine judicial law making, there was a change of government. Straws began to blow in the wind. Indeed, to those keeping an eye on such matters, there was a positive gale. Six months after Labour came into office, as early as 24 November 1997, there was one of a number of debates on the Human Rights bill. Lord Irvine LC expressly addressed the relationship, or tension, between Articles 8 and 10. I cite his words of twelve years ago merely to demonstrate the fallacy of those who *now* say that the recent developments in the law of privacy were unforeseen or not sanctioned by the legislature. Certainly, Parliament did not legislate expressly or specifically for remedies against the media in respect of infringements of personal privacy. Yet Lord Irvine acknowledged on that occasion that any law developed by the judges in relation to privacy, following what he called the "incorporation of the Convention" into U.K. law, would be a better law because they (the judges) would have to balance and have regard to both Articles 8 and 10. Again, you see, we come across my central theme of "balancing" and who it was that the government then thought should be holding the scales. Yet, a decade later, some media commentators are still behaving as though this was one of the best kept secrets in the government's legislative programme.

It is certainly true, at least until the Human Rights Act was eventually implemented on 2 October 2000, that the courts continued to operate in accordance with the Court of Appeal's acknowledgement in *Kaye*, in February 1990, that there was no cause of action simply based on infringements of personal privacy. Further, several years afterwards, in *Wainwright v Home Office* [2004] 2 AC 406 (the case about strip searching), the House of Lords rejected an invitation to declare the existence of "a previously unknown tort of invasion of privacy": see at [31]-[35]. Those are the words of Lord Hoffmann, with whom Lords Hope and Hutton agreed.

This was not, however, to deny the judicial function anticipated six years earlier by Lord Irvine of balancing, on the facts of individual cases, considerations of free speech and personal privacy whenever they come into conflict – since both reflect rights now incorporated into English law. That there is no contradiction is perhaps highlighted by the fact that, within months, Lord Hoffmann was also a party to the decision in the critically important case of *Naomi Campbell v MGN Ltd* [2004] 2 AC 457. How did this impact on the existing law and point the way to claims for damages over infringements of personal privacy? There were two aspects to the balancing question. I have already addressed the first, namely "who was to carry out the balancing exercise?" It is quite clear that it was always intended that it should be the judges (whether they happened to like it or not). It is on the second question that the *Campbell* case shed further light, namely "by what methodology?"

As you know, there had been long recognised a remedy for breach of confidence quite independently of contract. This is founded upon equity, where a duty is owed by one person to another as a matter of conscience. It was this set of principles which enabled Sir Nicolas Browne-Wilkinson as Vice-Chancellor, within a very short space of time after his address in Istanbul, to afford a remedy by restraining the publication of personal information by one person in a same sex relationship about the other: see *Stephens v Avory* [1988] 1 Ch 449. Again, there is no contradiction, because he saw this not as a matter of privacy, as such, but rather a remedy arising from a pre-existing personal relationship operating upon the conscience. This is sometimes nowadays referred to as "old fashioned confidence", by way of contrast with the new cause of action concerning personal information, although quite often, as you would expect, the two will overlap. Other examples are to be found in *Argyll v Argyll* [1967] Ch 302 (where the duty arose from the conventional relationship of marriage or, as it turned, a rather unconventional one) and, more recently, in *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57 (concerning an employee who held a position of trust in the Royal Household) and *McKennitt v Ash* [2008] QB 73 (about revelations concerning a long friendship with a singer).

There was, however, an important limitation about this law of "old fashioned confidence". No such claim could be brought against third parties, such as the media or paparazzi, unless such persons were correspondingly deemed to be bound in conscience (which would be most unusual). It is true that there had been a limited extension of the principle, such that if information had been passed to a journalist in circumstances in which he or she would appreciate that it was subject to a duty of confidence, then the journalist would be bound also not to breach that confidence. What was not accepted, however, was that a journalist or photographer who simply obtained such information independently would be subject to any such duty. Thus, for example, a paparazzo would be able to "purloin" (the word used in *McKennitt v Ash*) a digital record of what would obviously be private goings on, but without giving rise to any claim either in law or in equity. There is still not any right to protect one's image as such: see e.g. *Murray v Big Pictures* [2008] EMLR 12 (the case about photographs in a public place taken of J.K. Rowling's small child). But, image apart, a photograph can reveal information properly to be regarded as private in nature and, in that respect, the position has now changed. In the past, examples abounded of celebrities (whether A list or D list) being pursued on holiday or on honeymoon and being photographed unknowingly through a long distance lens while cavorting topless or naked.

Some advocates and legal commentators were keen to argue, when such images were snatched, at least on private property, or in circumstances where it would be obvious to the reasonable onlooker that the victim was entitled to expect privacy, thinking that he or she was unobserved, that the law should afford a remedy – but without success. This is no longer the position. This is where, at last, the House of Lords' decision in the *Naomi Campbell* case comes in. Importantly, it was there expressly recognised that a claim might lie simply in circumstances where the information in question was such that there was a reasonable expectation of privacy. In other words, even where there was no pre-existing relationship giving rise to a duty of confidence either in equity or in contract. The notion of "reasonable expectation", of course, makes clear that the test is an objective one, and also arguably less uncertain than that promulgated in the High Court of Australia, which imported the notion of what the reasonable person might find "offensive". The House of Lords found it unnecessary to go down that route.

A second apparent innovation in *Campbell* was the acknowledgement that privacy rights under Article 8, and the values associated with them, could be enforced horizontally, as between citizens, as opposed merely to imposing an obligation on the state to make provision for their protection. This did no more than reflect, however, a policy of the Council of Europe as expressed some years earlier in Resolution 1165 of 1998. It had stated that Article 8 rights were "fundamental to a democratic society". It was correspondingly accepted that remedies should be available to individual citizens against interference with privacy, not only where it came from representatives of the state, but also where it occurred at the behest of private institutions such as the mass media.

This was echoed by Lord Hoffmann in *Campbell*, at [50], when he observed that private information was worth protecting as "an aspect of human autonomy and dignity". He added that he could, therefore, see "no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the publication of private information for which there is no justification".

I pause at this point to highlight, in the light of these various pronouncements, that there is a *public* interest in respecting and protecting personal privacy. Thus, when the courts are called upon to adjudicate between the rights of individuals (celebrities or otherwise) and those of photographers or journalists to exercise their freedom of expression, it is between two competing *public* interest considerations that the assessment must be made. A decision then has to be taken as to which of them is to be accorded priority on the particular facts. The media thus should not be taken as having a monopoly of the public interest: nor their freedom of speech granted automatic priority over the rights of others for that reason.

In the light of these two important developments, how were the courts supposed to give effect to privacy rights against the press, given that neither Parliament nor the common law had hitherto acknowledged any such cause of action in the absence of contract or an equitable duty? The answer would appear to be found, simply stated, in the judgment of Buxton LJ, two and a half years after *Campbell*, in *McKennitt v Ash*, where it was said that we are now to look for our law of confidence in the jurisprudence engendered by Articles 8 and 10. His brethren agreed with him. In other words, thanks to the Human Rights Act, our law in this area is to be taken as deriving directly from the Convention and judicial interpretations of the relevant articles. There is nothing to be achieved by striving to squash the newly recognised cause of action into one or other of the traditional boxes. We do not need to waste energy on arid debate along the lines of the great Superman question: "Is it a bird? Is it a plane?" Why should it not be regarded as *sui generis*?

This had been emphasised in another House of Lords case, which also throws light on the methodology to be adopted by the courts in what has been described as "the new landscape":

Re S (A Child) [2005] 1 AC 593. The exercise is one of parallel analysis in which the starting point is presumptive parity, in that neither Article 8 nor Article 10 is accorded automatic priority. Neither article is to be taken as "trumping" the other. This state of equilibrium has, incidentally, to be contrasted with the position in the United States, where the First Amendment is accorded such a sacrosanct status. What is required on this side of the Atlantic is an intense focus upon the comparative importance of the specific rights being claimed in the individual case. Then the ultimate balancing test is to be carried out in terms of proportionality. This can in no way be pre-ordained. It is for the individual judge to assess on the facts of the particular case before the court.

This approach may be regarded as the plugging of a gap in domestic jurisprudence by the adoption and implementation of a new cause of action (although sanctioned by the 1998 Act). This is an unusual situation, to say the least. It has led to some confusion when it comes to reconciling the House of Lords' recent conclusion in *Wainwright*, to the effect that there is no hitherto unrecognised tort of infringing privacy, with the description sometimes now being used of a "tort" consisting of the misuse of private information. This term has been used at a very senior level, for example by Lord Nicholls in *Campbell* at [14] and by Lord Phillips at the Court of Appeal stage in the same case at [61]: see [2003] QB 633. Yet the terminology of "tort" has been, even more recently, disavowed in *Douglas v Hello! Ltd (No 6)* [2006] QB, at [96]. This is perhaps somewhat untidy as a matter of labelling. (I suppose it may be said that this is the sort of thing that happens if you choose to by-pass the Parliamentary draftsman.)

Even the editors of *Clerk & Lindsell* on Tort, at para 28-03, have expressed their doubts. They say that "the most favoured basis for the action to date is that of an equitable principle of good faith", but they nonetheless decided to include the general topic of confidence in their work because of its close relationship with other torts. Yet I notice that the editors of the latest (18th) edition of *McGregor* on Damages, just published, have taken the opposite view. They classify the cause of action as tortious in character: see para 42-017.

Confusing though all this may have been, it may simply come down to no more than a question of labelling. The essential point is that a new cause of action exists on the basis of which autonomy and dignity can be protected by the familiar remedies, where necessary, of injunction and damages.

It is thus appropriate to enquire how it relates to and interacts with other pre-existing causes of action. In what respects does it overlap or duplicate, and in what respects is it essentially different? To borrow a topical phrase, to what extent is privacy the new libel?

A very important aspect of this question relates to the different approaches currently adopted when the court is asked to grant interim injunctive relief. This happens to be the subject-matter of Max Mosley's pending application to the European Court of Human Rights. He is asking them to hold that there is a right to be fore-warned of any proposed infringement of privacy It arouses strong feelings in some quarters. There are strongly held views on both sides of the debate. It is certainly not for me to offer an opinion. (That is quite easy in this instance, since I don't happen to have one.) On one side, for example, was the view expressed by Ian Hislop to the Select Committee on 5 May. He stated that Mosley's suggestion is "just silly" and, as they say in *Private Eye*, "... er, that's it".

On the other side, there is an interesting article in the first issue of the *Journal of Media Law* by Professor Gavin Phillipson, who (perhaps unfashionably) supports the arguments in favour of Mr Mosley's claim. It is called "*Max Mosley goes to Strasbourg*". His thesis is that, "whilst a satisfactory remedy in the form of an injunction is available in theory, it is 'not effective in practice' if it can be – and is – denied at the discretion of newspaper editors". Moreover, in order to comply with its obligations the United Kingdom, as a contracting state,

has to afford remedies that *are* "effective in practice as well as in law". He cites in support of this proposition the decision of the Strasbourg Court in *Rotaru v Romania*, 28341/95 (2000-V) GC at [67]. According to this school of thought, a right of privacy is going to be of little use unless it is buttressed by an effective opportunity to prevent an intrusion occurring. The suggestion is therefore that there should be a corresponding right to prior notification, to give the subject of the proposed revelations a chance to seek relief before the court in advance of publication. This is anathema, needless to say, to journalists who tend to regard "prior restraint", or "previous restraint" as it is called by Blackstone, as inherently undesirable. They never acknowledge that the purpose of an injunction is to prevent conduct which is unlawful.

At the heart of this debate lie the distinct and separate mischiefs to which these two causes of action are directed. It is trite, of course, that the object of libel damages is threefold. They are to compensate for hurt feelings and injury to reputation, but primarily their function is to vindicate; that is to say, they are intended to restore, so far as possible, the claimant's reputation in the eyes of his or her fellow citizens. That is why people bring libel actions. Today, there would be no point in suing to make money. A successful libel claimant will rarely, if ever, find himself in pocket after a trial once the detailed assessment of costs has taken place.

Thus, at least in theory, the law operates on the footing that a damaged reputation can be restored by a largely symbolic award of damages. By contrast, however, once an intrusion has taken place into an individual's privacy and the personal information is published, the position is irretrievable. As Professor Phillipson has put it, "... the law can seek to compensate for this harm at final trial by awarding damages, but it cannot in any way cure the invasion of privacy: it cannot erase the information revealed from people's memories". He also cited the words of Professor Raymond Wacks from his short work *Privacy and Press Freedom* (1995): "Because the plaintiff's only concern is usually to prevent the information from being disclosed at all, the plaintiff will rarely proceed to trial after failing to gain interlocutory relief". Mr Mosley himself was a notable exception to that generally valid observation.

Although some *solatium* for hurt feelings and distress can be granted in monetary terms, that which was private will have lost its character permanently in becoming public. That is why Professor Phillipson argues that if the law is to provide an effective remedy it can only be by way of prior restraint.

In his article, he compared the position in France and Germany. The importance of prior restraint in the context of privacy has been recognised in both these jurisdictions. In France, Article 9 of the Code Civil would appear to allow for the seizure of a contested publication and, in particular, for breaches of "intimate private life". One commentator has observed in relation to French law and practice:

> "In most cases, plaintiffs prefer to prevent or to stop a breach to their 'intimate private life' happening. As a result, this emergency remedy has become the general remedy for the protection of private life, as opposed to normal procedures where judges award damages after the breach has happened."
> (C Dupre, *The Protection of Private Life against Freedom of Expression in French Law* (2000) 6 European Human Rights Law Review 627, 642)

Furthermore, these practical realities have already been recognised in various Strasbourg decisions relating to other contracting states, recently for example in *I v Finland*, 20511/03 (17 July 2008), where disclosures occurred from insecure medical records about the applicant's HIV status. Mere compensation *ex post facto* was held not sufficient to protect her private life: "What is required in this connection is practical and effective protection to

exclude any possibility of unauthorised access occurring in the first place". The relevant state was thus held to have failed in its positive obligation under Article 8.

It is obvious that prior restraint can only take place if the target of the revelations has information as to what is planned by one means or another. It is clearly a matter for debate whether, and to what extent, there should be imposed on the journalist or photographer any obligation to give prior notification and, no doubt, the European Court will pronounce its conclusions on the Mosley application. It is worth noting, however, first that if no such notification is given, so correspondingly any right of privacy is likely to remain unprotected. Secondly, it may be relevant to bear in mind that for many years it has been recognised in principle that journalists should generally give the subject of proposed revelations an opportunity to comment, and they frequently do so in an attempt to avoid inaccuracy and unfairness. Thirdly, in the libel context, the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 identified the giving of an opportunity to comment as one of the factors to be taken into account in assessing the extent to which a defendant's conduct can be characterised as "responsible journalism" for the purposes of the defence now often described as "*Reynolds* privilege".

There will naturally be some circumstances in which it will not be appropriate or necessary to afford such an opportunity, but it can never be a sufficient excuse to say that a warning would have enabled the complainant to apply for an injunction. After all, injunctions should only be granted to prevent the occurrence of unlawful behaviour and a judge should not grant such relief, consistently with s.12(3) of the Human Rights Act, unless he or she is satisfied that the claimant is *likely* to establish the illegality at trial and, correspondingly, the right to a permanent injunction at that stage. In a society governed by the rule of law, it may be thought unacceptable to prevent someone going before the court simply because a judge *might* grant an injunction wrongly. In any event, it would not be right, in general terms, to prevent such a claimant having access to justice, in accordance with Article 6, at the only time when he has the opportunity to obtain an effective remedy.

But let us assume, as often happens, that the complainant has managed to get wind of the threat of publication. In those circumstances, at least for the time being, the position in English law is that it is easier to obtain an injunction to restrain an infringement of privacy than it is to restrain the publication of a libel. Different criteria are applied depending on the cause of action. Indeed, that was a complaint made repeatedly by the editor of *Private Eye* to the Select Committee on 5 May this year. That distinction is the result of a historical accident and it may not last indefinitely.

The practice in defamation cases to which he was referring is known as the rule in *Bonnard v Perryman* [1891] 2 Ch 269, which goes back at least 120 years. It is to the effect, quite simply, that if a defendant deposes to the court that he or she intends to plead justification if sued (in other words, take on the burden of proving that the defamatory sting is true), then the judge will refuse an interlocutory injunction. The defamatory publication will be permitted to go ahead. The claimant will thus be confined to such remedies as he can obtain by going on to trial. The rule has been confirmed in the Court of Appeal since the advent of the Human Rights Act in *Greene v Associated Newspapers Ltd* [2005] QB 972, but it has never been considered in the House of Lords or, so far, in the Supreme Court.

By contrast, the position in privacy or breach of confidence is governed by s.12(3) of the Human Rights Act, which lays down that in a freedom of speech case the remedy is to be refused "unless the court is satisfied that the applicant is likely to establish that publication should not be allowed". This has been interpreted by the House of Lords in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 to mean that a claimant must show that he is more likely than not to succeed at trial.

It can thus be seen that Parliament requires the court to form a view (often on partial or incomplete evidence) as to the ultimate merits of the case. That will involve the relatively straightforward decision (in most cases) as to whether the information is such that the claimant would have a reasonable expectation of privacy in respect of it. But it may also be necessary for the court to evaluate, as best it can, any public interest argument to be raised by the defendant. It will not suffice, by analogy with *Bonnard v Perryman*, merely to *assert* that there will be a public interest defence.

What Parliament was seeking to achieve was that greater weight should be accorded to freedom of speech in any case in which it arose than if the court merely applied the conventional test for interlocutory injunctions – generally referred to as the *American Cyanamid* test: [1975] AC 396. If Parliament did not intervene, it was feared that someone could get an injunction by merely showing that he had an arguable case. The irony was, of course, that it seemed for a time that a lower hurdle was also being introduced for libel claimants – although that would not have been the intention of the government or the media lobbyists. Yet, if taken by itself, s.12(3) would appear to enable a libel complainant to obtain an interim injunction if he could simply show, on the available evidence, that his claim was likely to succeed at trial. This would often be likely to trump a defendant who had nothing more to show than an aspiration to plead justification. But it quickly became apparent that the long established and tougher test in *Bonnard v Perryman* would continue to apply in libel cases: see *Greene v Associated Newspapers*. Thus, s.12(3) was not intended to set a universal test in freedom of speech cases, but rather to provide a minimum safety net.

It is hardly surprising, therefore, that when it comes to interlocutory relief claims based on privacy are much more frequent, since Parliament chose to set a lower threshold than for libel cases.

I noted earlier that the House of Lords has never had occasion to consider *Bonnard v Perryman*. It may well be, if the opportunity arises, that the approach in *Greene v Associated Newspapers* will be endorsed by the new Supreme Court. But it has to be remembered that s.12(3) and *Bonnard v Perryman* are both to be regarded, in terms of the European Convention, as attempts to strike a balance between competing rights. Both address situations where a defendant's Article 10 rights come into conflict (at least potentially) with the rights of the complainant. Moreover, in recent years it has come to be recognised in Strasbourg that not only the right to privacy but also the right to reputation falls under the general protection of Article 8: see *Radio France v France* (2005) 40 EHRR 29 and *Pfeifer v Austria* (2009) 48 EHRR 8. In any event, the right to reputation had always been expressly recognised in Article 12 of the Universal Declaration of Human Rights and, more recently, in Article 17(1) of the International Covenant on Civil and Political Rights of 1996.

The question therefore arises as to why a different test should be applied to reputation cases from that laid down by Parliament for those concerning protection of privacy. What is the reason why it is, and should remain, more difficult to obtain an injunction to protect reputation than to protect another aspect of human dignity and autonomy, even though both are covered by Article 8? It *may* prove to be a sufficient answer as a matter of public policy that, in the case of defamation, damages are more often likely to provide an adequate remedy, whereas in privacy cases they are not. But the question at least needs to be addressed overtly.

It is not merely an inconsequential anomaly. It was made clear by the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457 and also in *Re S (A Child)* [2005] 1 AC 503 that competing Convention rights are to be weighed and assessed on the facts of the individual case before the court, not on the basis of generalities and not, in particular, by according *automatic* precedence to any one Convention right over another. That principle, enunciated

in the highest domestic court, accords also with the words of the Council of Europe in Resolution 1165 of 1998, to which I have already made reference in a slightly different context:

> "... the Assembly reaffirms the importance of every person's right to privacy, and of the right of freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value."

It is difficult to see how this analysis could possibly be compatible with the request made to the Select Committee on 23 April this year, by the representative of Associated Newspapers, that the law should be "recalibrated" to give greater priority to Article 10 over Article 8. This new approach, as recognised in those two leading cases in the House of Lords, inevitably means that there is a duty on the judge in each case to carry out a balancing exercise to be carried out after what is called "an intense focus" on the individual (probably unique) facts before the court. This "new methodology", as it has been described, does not always provide easy answers – still less before publication has taken place and before the full facts have become available.

By contrast, *Bonnard v Perryman* provided all concerned (judges included) with very easy answers most of the time. Editors or journalists would always be advised by their in house lawyers that, if they felt able to depose that a plea of justification was to be entered, then an injunction would be automatically refused – unless the complainant was, unusually, able to demonstrate conclusively that such a defence was bound to fail. It is difficult to avoid the conclusion that this doctrine therefore did indeed accord automatic priority to Article 10. That is why it has always been relatively easy to administer – not depending on the outcome of a balancing act to be carried out by the individual judge.

The question has thus to be asked at some stage why a different test should be applied at the early and often critical stage of considering prior restraint. It is a very important issue of public policy. It is not for me to argue for one position or the other. But the question of principle needs to be addressed and resolved. But the current distinction can be seen as a significant reason why infringement of privacy is proving for the moment, at least numerically, to be much more popular than libel. The editor of *Private Eye* is probably right about that.

Having said that, I must not overstate the case. A claim in privacy would not, as is sometimes suggested, enable villains to obtain an injunction in circumstances where there was a genuine public interest defence to be argued. This rarely arises because, in practice, most applications in privacy cases concern sexual shenanigans of one sort or another where there is no public interest argument available. As the editor of *The Guardian* told the Select Committee on 5 May, he would reserve his concern over the developing jurisprudence under Article 8 until such time as an injunction was granted in the teeth of a *bona fide* public interest argument.

The opportunities for by-passing the strict application of *Bonnard v Perryman*, by resorting to the new privacy cause of action, only come into play on a scenario where both libel and privacy present themselves as options. The classic case, as I have just noted, is that of sexual activity or perhaps domestic tittle-tattle. Increasingly, of course, it becomes difficult to envisage an allegation in relation to sexual activity which a modern jury would regard as defamatory when viewed in isolation. In order to make people think the worse of the person concerned, the activity would have to involve some form of exploitation of the young or vulnerable, or deceit of the kind generally encapsulated in the tabloid appellation "love rat" (normally in capital letters). But that is exactly where the issue most frequently arises.

By contrast, if someone is accused of (say) fraud, or of the misuse of corporate or public funds, that would properly be regarded as defamation territory rather than infringement of personal privacy. It would be concerned specifically with damage to reputation rather than with infringement of personal autonomy or dignity. Despite doom-laden predictions over the years, there is no reason to suppose that the Article 8 jurisprudence, or its application within the United Kingdom, is making it easier to cover up wrongdoing. It is quite true that personal finances have been recognised as an area in respect of which an individual has a reasonable expectation of privacy. That is hardly surprising. But if there is genuine reason to suppose that there has been wrongdoing, such as tax evasion or the laundering of drug money, there is no evidence to suggest that the court would be readier now to grant an injunction than would have been the case in the "good old days" when *Bonnard v Perryman* held sway exclusively. Either the court will take the view that there is no reasonable expectation of privacy at all or, if there is a *prima facie* expectation under Article 8, then the merits of a public interest argument would have to be left for investigation at trial without prohibiting publication. The claimant will then be left to any remedy he may have in damages.

I turn now from the vexed topic of "prior restraint" and the comparative ease with which the courts appear to have granted interim injunctions in privacy cases. That is undoubtedly one reason why it is said so often that privacy has become the new libel. There is another important distinction, again based on the inherent differences between the right to reputation and that of privacy. This goes to the relevance or irrelevance of the accuracy of the information it is intended to publish.

In the one case, there may be facts available which demonstrate that a person of good reputation does not deserve it. May be it can be shown that he or she is a thief or a paedophile. If so, the law should not assist in the suppression of those facts and the allegations can be published under the protection of a defence of justification. As Lord Denning used to say, "The truth will out". On the other hand, it has become clear in recent judgments, especially that of the Court of Appeal in *McKennitt v Ash* [2008] QB 73, that intrusions into personal privacy can be equally objectionable whether the allegations are true or false. The nature of the actionable wrong does not depend on their accuracy or inaccuracy. It has been held to be irrelevant. That is a fundamental distinction between defamation and infringement of privacy. If a newspaper asserts that someone, whether in the public eye or not, is suffering from cancer or has HIV, that intrudes into the territory of personal health – which is generally recognised as an area where there is a reasonable expectation of privacy. It is the probing into that forbidden territory that is of itself objectionable – not the accuracy of the journalism. Thus, it has been held that a complainant cannot be compelled to reveal whether the allegations are in fact accurate before obtaining relief from the court. Just as truth is not a defence, so too the journalist cannot rely upon his own inaccuracy as an escape mechanism. Arguments had been advanced once or twice, on earlier occasions, to the effect that "if it isn't true, it can't be private information". This obviously provides another attraction for complainants to go down the privacy route rather than libel in a case where both options are available.

It is true that in the *Mosley* case itself it became necessary for the court to examine the accuracy of the offending articles in certain respects. This was not as to the underlying issue of whether private events had taken place on private property. The video recording demonstrated plainly what had happened. What had to be investigated was the inference apparently drawn by the newspaper to the effect that holocaust victims had been "mocked" by NAZI role play. That only became a relevant matter to resolve because of the defence of public interest raised by the *News of the World* lawyers, of which it was an integral part. But ordinarily a claimant can legitimately expect that intrusive allegations about personal matters, such as sexual or family relationships, would found a cause of action without his having to go into detail as to how much is, or is not, true. Were it otherwise, the whole

purpose of the law would be defeated and the court process would itself become a means of intrusion.

A third significant distinction is that there is no right to jury trial in privacy cases, such as that provided in defamation claims by s.69 of what we must now learn to call the Senior Courts Act 1981 (originally called the Supreme Court Act, but now having to be restyled to avoid confusion). That will be regarded as an advantage or disadvantage according to your point of view.

There are other points of distinction to be noted when it comes to the question of compensation. Although it may sometimes be difficult to draw the lines, as a matter of principle it is clearly right that *solatium* for hurt feelings and distress would be recoverable whether a claimant sues in libel or for infringement of privacy. On the other hand, it is no part of the function of damages in privacy cases to restore reputation. Moreover, it appears so far to be the law that punitive or exemplary damages, long recognised as recoverable in the libel context (albeit rarely in practice), will not be available for infringement of privacy. That may be reviewed at some stage by an appellate tribunal. Meanwhile, it is clear that the editors of *McGregor* on Damages (18th edn), at para 42-017, consider that such damages *would* be recoverable – merely by reason of their classification of the infringement of privacy as a tort.

Standing back then, and looking at the law today, we can detect very significant differences between the approach of the courts now and that adopted a few years ago in the cases of *Theakston* and *A v B Plc*, to which I referred earlier. That is largely as a result of later cases such as *Campbell v MGN Ltd*, *Von Hannover v Germany* and *McKennitt v Ash*. One can identify at least three aspects of the *A v B* case that would now be unlikely to find favour:

(1) Most sexual activities would be construed as giving rise to a reasonable expectation of privacy whether within or without marriage, and wherever the location – assuming it is not in full public gaze. (There was the recent example of a couple engaging in what would be described by the Court of Appeal as "full sexual intercourse" on the grass at Windsor Castle in front of Japanese tourists with high quality cameras at the ready. That is probably beyond the reach of the law's protection.) But, above all, it would now appear to be tolerably clear that the law recognises a reasonable expectation of privacy in respect of sexual matters whether or not they happen to engage the distaste or the moral disapproval of the individual tribunal.
(2) It would probably make no difference that somebody has accorded the claimant that dubious modern accolade of being a "role model". The mere fact that you play football for Blackburn Rovers does not mean that your sexual activities are open to closer public or tabloid scrutiny. *Von Hannover* would appear to make it clear that even prominent public figures (let alone players in the Blackburn Rovers side) are entitled to a private life, which should only be intruded upon if justified by the contribution it would make to a legitimate public debate.
(3) Nor would the fact that the footballer's young lady companions want to sell their stories to the press mean automatically that the beans can be spilled. Of course, the law recognises that they would have rights of free speech under Article 10, but the competing rights have to be balanced against one another. Freedom of speech cannot automatically trump the other person's privacy. It is apparent from a number of subsequent cases that a relatively low priority will be accorded to those who wish to infringe another's privacy rights for reasons of gossip, tittle-tattle or financial gain without any element of public interest.

It is perhaps worth putting these matters in context and noting, while this jurisdiction may be unique in the way that it has chosen to go about the problem of protecting personal

privacy (by leaving it to judges to work out on a case by case basis), that the same public policy concerns are being addressed in other jurisdictions with similar legal traditions. It is not surprising that the matter is receiving careful consideration in the Republic of Ireland, where Article 8 also has a direct influence. But in Australia and New Zealand, too, attempts are being made to work out a principled framework that might be incorporated by statute. Earlier this year, for example, in New Zealand there was published the Stage 3 Report of the New Zealand Law Commission entitled *Invasion of Privacy: Penalties and Remedies*.

Thus, what has happened here over the last few years is not to be dismissed as a development explicable purely in terms of arrogant judges within this jurisdiction acting without reference to the legislature; or even by reference solely to the European Convention. It seems clear that at a similar point of development other western democracies are grappling, in their various ways, with the growing awareness that something has to be done to protect this aspect of human dignity and autonomy.

As I have suggested in the title for this talk, the question we need to address today, especially following the enactment of the Human Rights Act 1998, is not whether it is right to protect personal privacy, as an aspect of upholding individual dignity and autonomy, but rather how we should strive to get the balance right and adjust that balance from time to time in a rapidly changing society. I have given a rather technical account of what has been happening in recent years and how the balance is currently struck. But it would not be right to regard the outstanding issues as purely technical in nature or as being only for lawyers to debate. Since the balance in question is between two competing public interests, privacy and freedom of information, it is right to pay the closest attention to how informed observers, and journalists in particular, assess the situation as it now stands. All of us need to be alert and vigilant to ensure that one of these interests is not being given undue priority over the other.

One legitimate concern will always be whether the balance has been struck in such a way as to inhibit or "chill" the activities of legitimate investigative journalism. Perhaps, therefore, the last word should go to the authors of the report just published by the Reuters Institute for the Study of Journalism, based in Oxford. It is called *Privacy, probity and public interest*. Both are journalists by profession. Stephen Whittle is a former Controller of Editorial Policy at the BBC and before that was Director of the Broadcasting Standards Commission. The other, Glenda Cooper, has worked for a number of newspapers both in Britain and the United States, and for the BBC. She is currently a consulting editor at the *Daily Telegraph*. It is interesting to see, although it has not received much coverage in the press, that there is room for more than one view, even among journalists, as to whether we, as a society, are getting the balance right. One of their "key findings" is that:

> "There is no evidence of the courts exercising a 'chilling' effect on responsible journalism in the public interest but there is a challenge for newspapers and magazines who build a business model solely on infringing privacy through intrusive photographs or 'kiss and tell' revelations."

That would seem to suggest that the balance is about right at the moment but, as I have said, there is no room for complacency and we must all remain vigilant. I have no reason to believe, from their coverage so far, that vigilance on the part of the media is going in any way to subside in the near future. Although there was a remarkable flurry of activity in this field of litigation between 2004 and 2008 (between, say, the *Campbell* case in May 2004 and *Mosley* in July 2008), things seem to have settled down to a large extent. It is reasonable to suppose, from the lack of contested cases, that journalists and their lawyers have developed a feel for what is now acceptable to the general public (and to the courts) and what is not. As Whittle and Cooper have commented:

> "Seeking to balance competing freedoms can never be easy. Better by far, though, if those decisions are called correctly in newsrooms or editorial offices in the first instance. The courts are making it clear that they require media responsibility. They have given their steer. They should now be the place of last resort."

That is a proposition upon which we can perhaps all agree. The less opportunities there are for portraying the courts as being in conflict with freedom of the press, the better it will be for all concerned.

Sir David Eady
7.11.09
