# NORFOLK LAW LECTURE 2009

## Mr Justice Eady : Do we now have a law of privacy?

*[25/11/09]*

It has often been suggested that the English common law (as it originally was) has had a unifying and civilising influence around the world. There are now many common law jurisdictions operating on broadly similar principles. Important aspects of the systems are their capacity for organic growth and their responsive sensitivity to developments in society. In recent years, these characteristics have in certain respects been on the retreat. Two particular factors have played a part. First, the emphasis on the need for alternative dispute resolution ('ADR') and the early settlement of litigation has led in England & Wales to a substantial diminution in the number of contested trials. This means that in certain respects the opportunities for developing the common law have been correspondingly reduced.

Another factor is the increasing trend in modern times for the law to be micro-managed by statute or statutory instrument, so that much court time is being devoted to interpreting or seeking to unravel the infelicities of legislative drafting. This is not a matter of complaint. It is merely a fact of life. That is the way democracy has worked out.

On the other hand, in certain areas of activity the common law has gained a new vigour and momentum. By a strange irony this new lease of life derives in large measure from external influence. Courts in this jurisdiction are now required by Parliament to have regard to the European Convention on Human Rights and, in doing so, to follow the guidance offered in Strasbourg. For some, it would appear, this has been a source of frustration. Lord Hoffmann, for example, said in the Judicial Studies Board annual lecture on 19 March of this year, that the Strasbourg Court "… has been unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe". He added that "… it lacks constitutional legitimacy".

Yet paradoxically the common law itself has thereby had something of a shot in the arm. This is partly because of the need to follow general principles in a way that is somewhat analogous to our tradition of precedent, albeit less rigidly structured, but also because of the need to try creatively to adapt those principles to local conditions.

It is, I suggest, important to recognise that this is the common law at work in our jurisdiction. It is by no means, as it is sometimes portrayed in political or media commentary, the absorption or imposition of an alien creed. One has only to consider what would be the consequences if a UK government were to repeal the Human Rights Act 1998. It could hardly be imagined that such a far reaching step would simply put the clock back to where we were on 1 October 2000. Nor could it eradicate, by a stroke, the wider influence of the Convention upon domestic law and practice. It may be that this has been more rapid and pervasive since the 2000

watershed but, as you know, its values had been having a steady, if rather sedate, impact on our ways of thinking long before that.

I recall, by way of example, the observations of Lord Scarman in the context of contempt of court in the case of *Att.-Gen v BBC* [1981] AC 303 back in 1980. He was speaking very shortly after the influential decision in *Sunday Times v United Kingdom (No.1)* (1979) 2 EHRR 245, which led a little later to the enactment of the Contempt of Court Act 1981. He emphasised the need to restrict media coverage only to the extent that was necessary and proportionate to achieve the legitimate objective of protecting the administration of justice. What he was drawing attention to was simply that which has now become commonplace – the requirement for the courts to balance one Convention right against another according to the particular circumstances (in that case Article 6 against Article 10). A few years afterwards, when the *Spycatcher* case came before the House of Lords for the first time, a similar formulation was adopted by Lords Templeman and Ackner: *Att.-Gen. v Guardian Newspapers Ltd* [1987] 1 WLR 1248, 1296-7, 1307. The question was asked whether the original interim injunctions could be justified, in their interference with freedom of expression, as being "necessary in a democratic society".

In the last decade, this methodology has been so regularly applied in our jurisdiction that it has become a familiar element of the common lawyer's tool box. If the 1998 Act were repealed tomorrow, the influence of the Convention would in all likelihood still remain as integral to the fabric of the common law.

One branch of the law in which this can be clearly illustrated is that of privacy and breach of confidence. It has been said on various occasions, on high authority, that in England & Wales we do not have a free standing cause of action for infringement of privacy: see e.g. the decision of the Court of Appeal in *Kaye v Robertson* [1990] FSR 62 and that of the House of Lords even more recently in *Wainwright v Home Office* [2004] 2 AC 406.

Is it in 2009, however, any longer feasible to contend that there is no such right of action? There may be conflicting dicta as to whether it is tortious in character or founded in some other doctrine, such as an equitable duty of confidence. (There is an apparent dispute on that point, for example, between the editors of *Clerk & Lindsell* on Tort (19th edn) at 28-03 and those of *McGregor* on Damages (18th edn) at 42-017.) But the reality is surely now that a UK citizen has rights, at least in relation to personal information, that the domestic courts will protect by an award of compensation and, more importantly, in some cases even by prior restraint. Traditional categories are probably irrelevant. We do not need to expend our energies in debating whether we have attached the right label. After all, the very concept of enforcing "rights" itself is relatively new in our jurisdiction. New language may be quite appropriate: old language may lead to confusion.

The correct analysis is probably that offered by Buxton LJ in *McKennitt v Ash* [2008] QB 73 in December 2006; namely, that we now look for our law of confidence in the jurisprudence of Articles 8 and 10 of the Convention.

It was Richard Buxton, of course, who was one of the two disputants in the LQR of January 2000 as to the "horizontality" of Convention rights – the other being the

constitutional and administrative lawyer Sir William Wade. That debate would seem now to be largely of historic interest. It is probably fair to say that the official sanction, domestically, for the recognition that one citizen can sue another directly to vindicate rights under Article 8, is to be found in the House of Lords speeches in *Campbell v MGN* [2004] 2 AC 457, in May 2004. One should not lose sight of the European stimulus, however, to be found in the Council of Europe Resolution 1165 of 1998. This emphasised that Article 8 rights are "fundamental to a democratic society" and acknowledged that remedies should be available to individual citizens against interference with those rights by private institutions, such as the mass media, and not merely when it could be shown that a particular Member State had fallen down in its responsibility to provide effective remedies. This idea was reflected six years later in the speeches in the House of Lords.

In his lecture last March, despite his reservations about the Court of Human Rights, Lord Hoffmann acknowledged that it would still be valuable for the Council of Europe to continue to perform its original function of drawing attention to violations of human rights in Member States and providing a forum in which they can be discussed.

Indeed, in very similar vein to that of Resolution 1165, he himself in the *Campbell* case, at [50], made the following observations:

> "What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity. And this recognition has raised inescapably the question of why it should be worth protecting against the state but not against a private person. ... I can 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".

This represented a fundamental shift in judicial attitudes. It was only 16 years earlier, in 1988, that Sir Nicolas Browne-Wilkinson (still at that stage Vice-Chancellor, and yet to go to the House of Lords) voiced the traditional judicial reservations about becoming involved in developing a law of privacy:

> "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".

So what was it that accounted for this seismic change in perceptions of the judicial role? One reason is that there had been a re-assessment in Europe of the scope and purpose of Article 8. When the Convention was being drafted in the aftermath of the second world war, no one would have had in mind the protection of citizens from the press. The emphasis was on shielding the peoples of Europe from arbitrary executive

power – from the tap on the door in the middle of the night from the state police. For similar reasons, it was also considered a priority to guarantee the rights of a free press rather than having to worry about protecting citizens against journalists or photographers. But a free society will inevitably change significantly over half a century – and so can the free press which serves it. Relationships may have to realign themselves.

That is no doubt why, by 1998, the Council of Europe was overtly recognising that Article 8 also had the function of protecting individuals from media intrusion.

Strasbourg jurisprudence has had, therefore, to concentrate on the need to reconcile, in particular, the right to freedom of expression under Article 10 with the imperatives of Article 8. They are no longer seen purely in terms of physical protection against tyranny but also as embracing those more elusive concepts such as personal integrity, dignity, autonomy and reputation. It is apt to recall here, perhaps, that Lord Hoffmann in his lecture accepted that "… the practical expression of concepts employed in a treaty or constitutional document may change". He went on to give the example of the concept of "cruel punishment " – which might well be interpreted differently after half a century of social developments. It would also seem to be true of the concepts expressed in Article 8.

It is necessary here to have in mind another critical proposition from the Council of Europe's 1998 resolution:

> "... the Assembly reaffirms the importance of every person's right to privacy, and of the right to 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 was soon being frankly admitted that there is no method of achieving reconciliation between competing Convention rights of apparently equal status except by a balancing process. This has, where necessary, to be carried out by individual judges, according to the particular facts confronting them. That is clearly a new aspect of the judicial function. It involves an appraisal of the specific circumstances and should not be confused with the different, and more familiar, judicial task of exercising a discretion.

It is worth recalling that Article 10(2) from the outset provided for a qualification to the right of free speech in certain circumstances, such as where it became necessary and proportionate to impose restrictions in order to protect or vindicate an individual's reputation. Viewed from an English perspective, that briefly stated formula would seem to underpin and legitimise the whole corpus of our existing defamation law. This was, of course, developed much earlier in our jurisdiction, largely as a matter of common law, with its various defences such as justification, fair comment and qualified privilege. That represents a gradually evolved set of criteria for achieving a fair balance between competing rights and interests which remains, so far as I am aware, largely compliant with modern Strasbourg jurisprudence – at least in its fundamentals: see e.g. *McVicar v United Kingdom* (2002) 35 EHRR 22; *Steel v United Kingdom* [2005] EMLR 314; and *Times Newspapers Ltd (Nos 1 and 2) v United Kingdom* [2009] EMLR 254.

It is interesting to see that the protection of reputation, identified expressly in Article 10(2) although not in Article 8, has recently been itself judicially acknowledged as being within that group of rights falling under the protective umbrella of Article 8: *Radio France v France* (2005) 40 EHRR 29 and more recently *Pfeifer v Austria* (2009) 48 EHRR 8. Thus the protection of reputation is coming to be seen as simply one aspect of the elusive package of rights and interests to which I referred earlier (such as autonomy, dignity and integrity). That thinking probably reflects the link to be found in Article 17(1) of the International Covenant on Civil and Political Rights 1996:

> "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".

These are difficult ideas to define in some cases but the move towards their protection seems to be inexorable. It is closely allied to other means of respecting human dignity and autonomy, for example by legislation against discrimination on grounds of race, religious belief, disability, gender and sexual orientation. Obviously, any proposed reforms of the law of defamation would need to take these developments into account.

It goes without saying that the principle set out in Article 17(1) begs some rather important questions. There is room for wide disagreement as to what degree of interference with such rights should be regarded as "lawful" and what should not. It is clear, for example, that the attitude of lawyers in the United States is significantly different as to where the balance should be struck between the protection of reputation and that of freedom of expression. Under the First Amendment of 1789 the importance attached to freedom of speech is accorded a special priority. Hitherto, in this jurisdiction we have tended in our law to accord rather more significance, than is now given in America, to the values of truth and reputation. This is largely due to distinct cultural traditions rather than mere backwardness on our part. What is more, our ordering of priorities is by no means unique to us, since a similar approach is taken not only in other common law jurisdictions, such as Canada, Australia and New Zealand, but also in Europe – as recent Strasbourg jurisprudence illustrates.

Once the Human Rights Act came into effect in October 2000, English courts were obviously, as public authorities, obliged to give effect to all aspects of Article 8 as now interpreted – including those aimed at the protection of autonomy, dignity and personal privacy. What is more, they had a clear run at it so far as personal privacy was concerned because, for historical or political reasons, Parliament had taken no specific steps to legislate for its protection. All we had, in the absence of contract, were the long established but rather restricted equitable principles whereby to enforce a duty of confidence. It was well understood, however, in the years leading up to the *Campbell* case that it was necessary, in order to take advantage of this equitable doctrine, that one should be able to demonstrate a pre-existing relationship giving rise to a duty of confidence.

It was this doctrine that enabled Sir Nicolas Browne-Wilkinson (curiously within a year of his remarks about privacy I quoted a moment ago) to establish an important principle of what I think we would now simply call privacy law; namely, that a duty

of confidence is owed by long term sexual partners to one another (including those in same sex relationships), such that courts can restrain a breach: *Stephens v Avery* [1988] 1 Ch 449. He was able to achieve this by relying on the long established equitable principles governing relationships of confidence. These recognised duties arising by reference to the conscience quite apart from any enforceable contract (such as is often to be found in the employment context). He saw no inconsistency at that time between protecting confidential information in that context while counselling against a law of privacy more generally.

Such a pre-existing relationship would ordinarily be difficult to establish where the right was infringed out of the blue by paparazzi or a tabloid "scoop". This proved to be a significant stumbling block to the judicial development of a law of privacy in our jurisdiction for many years. Moreover, there was no prospect of statutory development. This was despite considerable public disquiet in the late 1980s and early nineties at what was perceived to be increasing press intrusion into private lives – mostly those of celebrities, but by no means exclusively so.

This had led to no less than four private members' bills being introduced at Westminster between 1987 and 1989. It led also to the Home Secretary appointing a committee under the chairmanship of the late David Calcutt QC to look into matters and report to Parliament. This they did in June 1990. The lawyers on the committee, of whom I was one, were in favour of introducing statutory provisions and attached a draft bill intended to show that problems of definition could be overcome. It obviously included a public interest defence. Also, in seeking to achieve clarity and predictability, they excluded anything occurring in a public place and anything to do with a trade, business or profession. What the draft sought to do was to limit the application of the proposed law of privacy to truly personal information. This would, it was hoped, avoid the use of any such provisions being seized upon to cover up wrongdoing in a business or corporate context. (Of course, to the modern observer this would now be seen as an unduly narrow focus in the light of several years of Strasbourg jurisprudence, in which no such rigid boundary is drawn.)

Even this, however, was too much for the remaining members of the committee. They were prepared to acknowledge that a bill could be drafted, but were not in favour of recommending legislation at that stage. They had faith in self-regulation, as a general concept, though not in the vehicle through which it was then implemented, the Press Council. They wanted to give it one final chance to work under a new guise.

So what was recommended was to put the Press Council, by then 40 years old, out of its misery. A substitute body called the Press Complaints Commission was speedily set up and launched in January 1991. This is still going more than 18 years later. Views differ as to how effective it has been. It is true that at regular intervals it receives lavish praise, but that tends to be mainly in its own annual reports. These consistently point, as evidence of its success and popularity, to the increasing number of complaints received. It is fair to say that there is room for at least one other interpretation of this trend.

One of the criticisms most frequently levelled at the PCC is that it lacks teeth. It cannot impose any sanction or award financial compensation. But that is hardly

surprising in relation to a non-statutory body, operating outside the system of courts and tribunals which exercise authority on behalf of the state. It is also said by many to lack independence. As Max Mosley himself put it earlier this year when appearing before the Culture, Media and Sport Select Committee, "it is like having the Mafia in charge of the local police station". That may be somewhat unfair to the PCC, which is said to exert a powerful and beneficial influence behind the scenes, but it is unfortunately a common enough sentiment among casual onlookers. Some still see it as primarily a protagonist for press freedom, rather than as an impartial adjudicator of complaints.

So, despite sporadic calls for legislation during the 1990s, no law of privacy was introduced.

Meanwhile some advocates had made attempts to show that a duty of confidence could sometimes arise merely as a result of the nature of the information to be revealed; that is to say, where it was inherently so obviously personal and private that it had to be recognised as confidential in the hands of anyone who came into possession of it (e.g. by taking an intrusive photograph through a bedroom window by telephoto lens).

Some of the older among you may recall, for example, the time in August 1992 when a certain Duchess ran into problems on a foreign holiday. She was photographed from a distant hillside while relaxing by the swimming pool on private property beside a gentleman who was described as her financial adviser and, as it happens, also a rubber duck. An application was made for an injunction to prevent publication in the tabloids. The judge rejected this application on the simple ground that there was no law of privacy. This had been made clear, after all, only two years earlier in *Kaye v Robertson* [1990] FSR 62.

This was the well known decision of the Court of Appeal involving the actor Gordon Kaye who was starring in a popular TV series ('Allo 'Allo). On 25 January 1990 (while the Calcutt Committee was in the midst of taking evidence) he received severe head injuries during a freak storm in London. He had to undergo brain surgery and was still lying semi-conscious in his hospital bed when journalists from the Sunday Sport newspaper came into his room disguised as nurses or doctors, took photographs of him and purported to conduct an interview.

When it came before the Court of Appeal, the judges felt powerless to do much about it. It was expressly confirmed that there was in our jurisdiction no law of privacy. That conclusion was to all intents and purposes enough to dispose of the matter. Nevertheless, not least because the Calcutt Committee was in the midst of taking evidence at that time, and the subject was especially topical, the members of the court respectfully urged the legislature to consider whether the time had not come to plug the gap. For example, Leggatt LJ commented:

> "This right [i.e. of privacy] has so long been disregarded here that it can be recognised now only by the legislature. Especially since there is available in the United States a wealth of experience of the enforcement of this right both at common law and also under statute, it is to be hoped the making good of this signal shortcoming in our law will not long be delayed".

Naturally, the Gordon Kaye episode gave considerable power to the elbows of those pressing for privacy to be protected by statutory intervention. The decision of the Court of Appeal had illustrated very clearly how inadequate existing causes of action were for dealing with intrusions of that kind. It would not be covered by assault or trespass, for example. Nor even would it have been covered by the later statutory remedies for harassment introduced in 1997 (which require a course of conduct rather than one incident). What the intruders did to Gordon Kaye could not be assessed in terms of earning capacity or his property rights. They did not assault him physically or trespass upon his property. It had thus become apparent that the vindication of human dignity and the autonomy of the individual could not be embraced within any of those traditional templates. As Strasbourg has recognised, there is something about human beings which goes beyond the merely physical, or the proprietary, and of which the law ought to take cognisance.

Even the Gordon Kaye episode, however, failed to convince the journalists on the Calcutt Committee that legislation was required. Moreover, there were powerful representations from the press both to the committee and later to ministers and Parliamentary select committees. Politicians were naturally reluctant to embrace any reform if it involved defying the modern equivalent of the press barons. The favourite arguments always deployed against it were, first, that it would only serve the "rich and famous". These were naturally the very people in respect of whom most infringements were taking place. Yet the argument was that neither they nor anyone else should have their rights protected. The logic is somewhat elusive. Secondly, it was said that a law of privacy would hinder investigative journalists seeking to expose wrongdoing.

This, of course, by no means necessarily followed. Nobody ever suggested that such a law should be introduced which took no account of Article 10. There would naturally have to be a public interest defence that would enable Article 8 rights to be overridden where necessary to allow for the exposure or prevention of crime and other wrongdoing and also to avoid the public being misled by lies and hypocrisy. But the press arguments, even today, generally ignore this. Perhaps the most notorious, and cynical, exponent of this thesis, from the Calcutt era, was none other than Robert Maxwell. He arrived to give his evidence to the committee breathless and sporting a scarf in the colours of the Oxford United football club, of which he was chairman. In his sonorous but chilling voice, he told us, "If you introduce a law of privacy, many a rogue will go undetected". He, of course, went undetected for many years, and indeed for another 18 months thereafter, but that was certainly not because of any law of privacy but rather (dare one suggest it?) from a want of investigative journalism. Had a law of privacy existed in those days, there is no reason to suppose that it would have inhibited any expose of Robert Maxwell. There would have been the plainest public interest. (It is true that he relied heavily upon the tactic of showering all and sundry with libel writs and managed to silence a good deal of criticism by that means. The point I am now making is that a law of privacy would not of itself have hindered his exposure. Nor is there any evidence that recent developments in our law and practice have had that effect.)

Nonetheless, it was the argument expounded by Maxwell that won the day.

If in any given state that has signed up to the European Convention the legislature chooses, for whatever reason, *not* to provide statutory obligations or guidelines in respect of some particular Convention right, there would be no alternative but for the judiciary to develop eventually a set of rules by a gradualist process (such as that which over the centuries developed the law of defamation). That would be likely to involve a degree of trial and error, and it might have been feared that it would take an undesirably long time. In the event, it would appear that this fear has proved to be unfounded. In the space of less than five years, following the Naomi Campbell decision, the courts seem to have developed the practical application of a law of privacy that is for the most part principled and workable. Moreover, importantly, it has enabled in house media lawyers to know more or less where they stand.

It was long foreseeable, however, that once the UK enacted legislation along the lines of the Human Rights Act, with its obligation upon the courts to protect Convention rights and to take account, in doing so, of Strasbourg jurisprudence, any gap left by the legislature would have to be filled. The Convention abhors a vacuum. There are no "no go" areas. Even in relation to state security, it is not possible to exclude altogether the criteria of necessity and proportionality. Just as there is no room for absolutism in that context, it has become apparent that freedom of speech cannot be absolute either. This has been recognised for some time in respect of so called "hate speech", relating to groups or classes, but it must also follow where individual rights are threatened.

Yet this flexibility is for many people a startling concept. It is to be contrasted with the more absolutist priorities to be found in the United States, with its sanctification of free speech in the First Amendment – often, as I have said, at the expense of establishing where the truth lies in the context of alleged wrongdoing. It is worth noting that the need for a balancing of Convention rights was always in the contemplation of the legislature when it enacted the Human Rights Act. As early as 24 November 1997, when the bill was being debated in the House of Lords, Lord Irvine LC expressly recognised that it would be for judges to carry out his exercise and to have regard to both Article 8 and Article 10. In other words, the latter will sometimes have to yield to the former.

The concept of balancing rights, albeit relatively new to the common law, is an inherent part of Strasbourg thinking. It is inevitably required where one has to address, in situations of conflicting Convention rights, such notions as necessity and proportionality. Moreover, in our jurisdiction it is now sanctioned by the highest authority in the House of Lords decisions in *Campbell v MGN Ltd* and *Re S (A Child)* [2005] 1 AC 503. The circumstances of the *Campbell* case are well known. Ms Campbell is a famous model and was photographed emerging from a drug rehabilitation clinic. The *Campbell* case illustrates how circumstances can combine uniquely to make the answer far from obvious – as is borne out by the significant differences of view which became apparent in the House of Lords.

The circumstances of *Re S (A Child)* were very different. The case started off in the Family Division and was concerned with whether a judge in care proceedings, concerning a child called "S", could restrain press reporting of the murder trial of his mother. She was charged with the murder of his brother. The child "S" was not directly concerned in the proceedings and, therefore, did not fit within the traditional

statutory conditions, which would be effective to prevent the identification of a child who was (say) a victim or witness. In the House of Lords the lead was taken from the *Campbell* case, and it was said that the issues had to be analysed and resolved by reference to the competing Convention rights to which the case gave rise. There was no need to become bogged down in trying to bend existing doctrines to fit the facts.

The new methodology plainly requires that no one Convention right shall be given automatic priority over any other. It is for the court to apply an intense focus to the particular facts of the case (which are, at least in combination, likely to be unique), and then to carry out what is called "the ultimate balancing exercise" tailored to those individual circumstances. The answer as to which competing right is required to give way to the other will probably turn on considerations of proportionality, as Sedley LJ observed some years ago in *Douglas v Hello! Ltd* [2001] QB 967 at [137].

Naturally, this exercise can be made to appear outrageous once it is portrayed, as it inevitably is, as a titanic struggle between the upright and courageous journalist who seeks to exercise his or her freedom of expression, selflessly on behalf of us the public, and the repressive forces of law and order. These are usually represented, of course, by an out of touch elderly judge living in an ivory tower, and reaching for a decanter of port. There is surely no contest. After all, judges, apart from anything else, are "unaccountable" (quite unlike journalists, of course).

This problem is multi-faceted but there is one consequence that has attracted particular attention, not to say shock horror, among media commentators.

This has been the dawning recognition that balancing one person's freedom of speech against another's right of privacy (and its various elusive elements like "dignity" and "autonomy") will inevitably require, in particular circumstances, that an individual's right to express himself or herself will need to be evaluated in order to see whether proportionate restrictions upon it will be in order. It is thus inherent in the process that others will be entitled to make a judgment about the comparative worth of what has been, or is intended to be, said. Even I, in my ivory tower, accept that this can at first seem shocking because of its Big Brother connotations. It seems remarkable to all of us perhaps that in 21st century Europe it is being contemplated that there should be more, rather than less, control of one person's exercise of freedom of speech by others. Yet it has been said, loud and clear, in the House of Lords that (just to take the two extremes) a higher priority should be accorded to "political speech" than to (say) "tittle tattle about footballers' wives and girlfriends".

There were and still are genuine concerns and not least over the element of uncertainty or unpredictability. This impacts directly upon journalists and those who have the responsibility of offering them legal advice. It undoubtedly was, at least for a time, making their lives more difficult. That is an important consideration. It has been said in the Strasbourg court itself in *Goodwin v UK* (1996) 22 EHRR 123, 140:

> "… the relevant national law must be formulated with sufficient precision to enable the persons concerned – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".

It is perhaps at this point worth recognising that there are at least two types of uncertainty. One you can do something about; the other you can't. For one thing, there is uncertainty as to *principle* that is capable of being resolved by judicial or legislative decision. By way of example, there is one area of uncertainty calling out for resolution in our own jurisdiction at the moment. It has potentially far reaching implications for the media.

It derives from the Strasbourg decision in the important Princess Caroline case: *Von Hannover v Germany* (2005) 40 EHRR 1. It was not a Grand Chamber decision, but it has nevertheless already been hugely influential in this jurisdiction and elsewhere. Yet there remain, even in Strasbourg, uncertainties as to its meaning and full significance. Princess Caroline had complained, originally to the German courts, that she had been troubled by constant attention from paparazzi as she went about her daily life – including, importantly, in public places. The domestic court had rejected her complaint, largely on the basis that she was, even though not a public figure in the sense of having any governmental responsibility, nonetheless "a figure of contemporary society '*par excellence*'". It was thus held in Strasbourg that she had not been accorded adequate protection in the German courts for her Article 8 rights. The undoubted intrusion into her life could not be justified merely on the footing that she was, in effect, a socialite or celebrity.

It was in these circumstances that the Court came up with this rather sweeping test, it has to be said, of whether the publication of the articles and photographs in question would fulfil the somewhat high-minded criterion of "contributing to a debate of general interest". It was said at [65] and [76] that this was to be the decisive factor in balancing freedom of expression and the Princess's Article 8 rights. It has been followed in other Strasbourg cases: e.g. *Leempoel v Belgium* (64772/01), 9 November 2006.

It is now a topical (not to say pressing) problem in England whether the Strasbourg court is really to be taken at face value in this respect. Many think it goes too far. It has been observed that if this is to be the approach taken in relation to celebrity photographs it would herald in Britain nothing less than a revolution in the prevailing journalistic culture: see Tugendhat & Christie, *The Law of Privacy and the Media*. The question came into focus in August 2007 in the case concerning photographs taken in the street in Edinburgh of the child of JK Rowling (of Harry Potter fame). The publishers and photographic agency sought to bring the claim to a summary conclusion on the basis that this could not give rise to a cause of action.

The first instance decision was that of Patten J (as he then was) sitting in the Chancery Division. The case is called *Murray v Express Newspapers* [2007] EMLR 22. At [47] he expressed his agreement with the observation of Tugendhat & Christie to which I have referred. It was a careful and analytical judgment which discussed the dilemma very fully. As he pointed out, if it really had to be shown, for any photograph taken in a public place to be published, that it contributed to a public debate, that would mean that very little could be published indeed. Patten J refused to grant a remedy notwithstanding *Von Hannover*. So had I, the year before, in a much more superficial *ex tempore* judgment concerning photographs taken of Elton John walking between a car and his front gate: *John v Associated Newspapers Ltd* [2006] EMLR 722.

As Patten J warned, there is a danger that *Von Hannover*, if given its most absolutist construction, would lead by a side wind to an actionable right to protect one's image. He added:

> "If a simple walk down the street qualifies for protection then it is difficult to see what would not. For most people who are not public figures in the sense of being politicians or the like, there will be virtually no aspect of their life which cannot be characterised as private."

Unfortunately, the *Von Hannover* decision came only weeks after the House of Lords' decision in *Campbell v MGN Ltd* in May 2004. Had it been promulgated a few weeks earlier, it might or might not have made a difference to the outcome, but at least there would have been some illuminating domestic guidance to courts in the UK as to how it should be approached and where the missing boundaries should be drawn. This would, I imagine, have made the task of judges such as Patten J and myself rather more straightforward with regard to street photographs. Their Lordships spent a good deal of time considering in what circumstances it would be appropriate to restrict street photographs. As was noted later in the Court of Appeal in the case of *McKennitt v Ash* [2008] QB 73 at [39], if their Lordships had had available the *Von Hannover* judgment in time for *Campbell*, they might have taken an altogether shorter course in arriving at their conclusions.

The contrast was drawn, for example, in *Campbell* between photographing a celebrity in some unremarkable and innocuous activity like popping out for a pint of milk and catching somebody in the course of something distressing and intimate, such as happened in the case of *Peck v UK* (2003) 36 EHRR 41. There it appears that Mr Peck had been caught by CCTV cameras trying to commit suicide in a public place, and these had been published in the media. One can understand why this was thought to be unacceptable. As Lord Hoffmann commented in *Campbell* at [75]:

> "… the widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information".

Yet, in the light of *Von Hannover*, there is an obvious risk that even "popping out" for a pint of milk might now be thought to be a private matter and out of bounds to paparazzi. So this is one important area in which clarification could be given, and life would be easier to some extent for in house media lawyers and those they advise.

The JK Rowling case might have afforded an opportunity to clear things up once and for all. It went to the Court of Appeal and the judgment was handed down in May last year: *Murray v Big Pictures* [2008] EMLR 12. The appeal was allowed mainly for two reasons. One was that the rights of the small child might need to be considered separately from those of his parents. Secondly, the court needed to find the facts first before a firm conclusion could be reached on the merits. The matter could not be definitively resolved on a summary footing. Unfortunately, from our point of view as interested onlookers, but not surprisingly, I understand that the case has settled and the opportunity it afforded for clarification has gone.

As I have already pointed out, however, apart from such major questions of principle, there are other forms of uncertainty which are really inherent in the balancing process now required. It has to be faced that either you have absolutism, which brings with it a degree of certainty, or you have balancing. If a judge has to apply an intense focus to the facts of the particular case, and then carry out the "ultimate balancing exercise", it is hardly surprising that in house lawyers were going, at least for a time, to be a little timid in predicting the outcome.

The process is in some ways analogous to that involved in exercising a discretion. The grant or refusal of an injunction is a discretionary exercise. The "ultimate balancing exercise" now required of judges is not a discretionary one, but it carries with it a comparable uncertainty of outcome unless the facts are very straightforward. In the context of privacy, as yet, relatively few principles have to be applied. One simply has to ask, first, "Are the applicant's Article 8 rights engaged?" (In the Princess Caroline case the Strasbourg court appears to have assumed that they were, without feeling the need to delve too deeply into why.) If so, one proceeds to stage two, and comes to a conclusion whether it is necessary or proportionate to restrict A's freedom of speech (either prospectively or in hindsight) in order to protect B's dignity, autonomy, reputation, privacy and so on. This is a matter of judgment. There can be no absolute answer.

It will be rare for a judge to misdirect himself on the few relatively simple principles that are to be applied. It will be far easier, however, to come to a conclusion with which a significant number of people disagree. Yet it has been made clear more than once that it is not for the Court of Appeal to substitute its own judgment for that of the court of first instance which, having applied its intense focus, has struck the balance between the competing Convention rights. That has been re-emphasised in a number of recent cases culminating in *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103 at [45] (where the other cases were listed). The then Master of the Rolls there explained that, because "different judges could properly reach different conclusions":

> "… an appellate court should not interfere unless the judge has erred in principle or reached a conclusion which was plainly wrong or, put another way, was outside the ambit of conclusions which a judge could properly reach".

What is more, in no less than four recent important privacy cases, the House of Lords has refused to entertain appeals in which the media wished to test the boundaries of this rapidly developing law of privacy: *Lord Browne of Madingley* (cited above), *McKennitt v Ash* [2008] QB 73, *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57, and in *Murray v Express Newspapers*. This probably indicates that their Lordships were of opinion that there was nothing useful to add to what had been said in *Campbell v MGN*. Nevertheless, it was proving frustrating for the media (and no doubt Associated Newspapers in particular, which seemed to be involved in a significant proportion of the cases). What it brings home is how much power this process is placing in the hands of individual judges. It is so often effectively unchallengeable as to how it is exercised in any given case. The concerns of the media and their lawyers are therefore entirely understandable. All that is left to them is the chance to take a sideswipe at the individual judges who happen to make the

decisions. It may be an unfortunate development that the press should be at loggerheads with the judiciary, but it was bound to happen.

One decision in December 2006 seemed to cause particular resentment. It is known as *CC v AB* [2007] EMLR 312. I had granted an injunction to a man who had previously been involved in a relationship with a woman who happened at the time still to be married to someone else (although he denied that he knew she was married). He was trying to reconstruct his own marriage by this time and he was concerned, it was said, about the impact on his wife and children of tabloid coverage of the affair. Also his wife was (according to the evidence) threatening to commit suicide. The problem arose because the woman's husband was trying to sell the story, as he readily admitted, partly to make money for himself and partly out of revenge. To be fair to the tabloids, they were showing some reluctance precisely because of concerns about the wife's health. I held that the fact that the relationship had been adulterous did not, as such, mean that there had been no reasonable expectation of privacy, and that the "ultimate balancing exercise" came down in favour of granting relief.

One journalist especially went off the Richter scale in the *Mail on Sunday*. She takes a strong line about adultery, and will apparently have no truck with understatement either. A few snippets will suffice:

> "What in heaven's name does our judiciary possess under its collective wig? Once again, human rights law appears to have caused a judge to depart to an entirely different moral and intellectual planet…
>
> It is … a most dangerous, unjust and illiberal ruling with deeply disquieting implications. Indeed, as one reads through the whole of it the more outrageous the judge's fundamental assumptions are revealed to be: … the reasoning by which he arrived at the manifest injustice of rewarding a wrong-doer at the expense of his victim was simply jaw-dropping".

Now we come to her real grouse:

> "A society polices itself as much by cultural signals as by the enforcement of the law".

By "cultural signals" she clearly meant that which is published in the *Mail on Sunday*. She continued:

> "Informal sanctions such as public humiliation, scorn or shaming are important in reaffirming the boundaries of what is considered acceptable behaviour and helping ensure that people adhere to them. Centuries ago, this function was performed very effectively by the stocks. Today's press fulfils much the same kind of function. It allows individuals to identify those who they feel have wronged them and hold them up to public ridicule or contempt. Rough justice certainly – but a form of justice nevertheless".

She then went on to accuse me of "social and moral nihilism".

So I gather that this journalist, for one, would like to bring back the stocks for adulterers (whatever the state of the marriage in question presumably, and certainly without taking the trouble to find out). No doubt she would reintroduce them for erring judges too. All this fulmination ended in something of an anti-climax three weeks later, when Buxton LJ refused permission to appeal – and that was that.

Obviously, there is nothing to be gained by this *ad hominem* approach. It hardly advances the argument. What is required of the disaffected is to challenge the balancing role given to the judges by Parliament, in the way described by Lord Irvine all those years ago, and to say what they would put in its place. After all, it is reasonably clear that they cannot simply throw their hands in the air and say, “Let’s ignore Article 8”. Citizens in the United Kingdom are entitled to have those rights protected. Between 1966 and 2000, they had to go to Strasbourg and incur considerable expense and delay to achieve that objective. Now, for the time being at least, they can have resort to domestic courts. If someone sought by legislation to subordinate Article 8 to Article 10, that would appear to be inconsistent with Resolution 1165 and a whole raft of Strasbourg jurisprudence. United Kingdom citizens would just have to go off once again to Strasbourg to obtain their remedies.

The complaint is often made that judges are introducing a law of privacy without any Parliamentary sanction. For example, the editor of the *Mail on Sunday* (yet again) wrote a piece early last year while he was still smarting from not being allowed to publish the Prince of Wales’ diaries (which had been disclosed in breach of contract by a former employee). It included these two propositions:

> “Not only are important news stories being suppressed, and wrongdoing protected, but a law of privacy is being created, not by our elected representatives in open debate, but by judges, sitting in secret”.

It cannot be stated too clearly that this charge is simply without foundation. It is true that Parliament has time and again declined to introduce a specific statutory law of privacy, but it did enact the Human Rights Act 1998 and cannot have overlooked the consequences. The courts were thereafter bound to give effect to Article 8 and, in doing so, to follow the guidance of Strasbourg jurisprudence. As for secrecy, the reasoning of the court, whether of the Court of Appeal or of the judge at first instance, is there available on the internet for anyone to read and criticise – how else could I be accused of social and moral nihilism? Indeed, whatever may be thought of the outcome in the *Mosley* case, it could hardly be characterised as secret justice.

There followed another couple of bursts of outrage following that decision in July last year, and then again in November, when a *Daily Mail* executive gave a speech to the Society of Editors. It was the same familiar theme – the same old frustrations venting themselves on the same targets. I was said, for reasons which remain unexplained, to have set myself above the legislature. This proposition was even given another airing on 23 April this year before the Parliamentary Select Committee then examining these matters. I was rather amused watching the proceedings to see the same man yet again asserting that I am “arrogant and amoral”, but he did add rather generously that it was nothing personal.

As he indicated more than once in his address, there has been a certain amount of lobbying going on in the background of government ministers. There is now talk of introducing a statutory law of privacy. The Justice Secretary, Jack Straw, went on record early this year suggesting, in the light of press concerns, that the government might give the law something called "a statutory nudge". One wonders in which direction. So we await developments with interest. The Select Committee is due to report in the near future.

It is perhaps worth addressing briefly two of the arguments the *Dail Mail* representative raised before the Select Committee, just to think through and try to understand their full implications. First, he was asked by a member of the Committee, "If you don't like the Human Rights Act and the way judges are interpreting it, would you suggest a statutory law of privacy?" To this he replied that he simply did not want a law of privacy at all. So it would presumably follow that he is suggesting that neither judges nor legislators should give effect to Article 8 at all or at least in so far as it concerns the media. It is difficult to see how that can now be a practical option given that we are and have been for decades signatories to the Convention. All that would happen is that our citizens would have to go all the way to Strasbourg once again to confirm or enforce their rights.

Another phrase used was that the law should be "re-calibrated" to give greater weight to freedom of speech relative to personal privacy. Many no doubt take the same view. Taking his cue from Lord Hoffmann's Judicial Studies Board lecture, the man from the *Daily Mail* was particularly critical of an observation in *Von Hannover* by the Slovenian judge (Judge Zupancic) to this effect:

> "I believe that the courts have to some extent and under American influence made a fetish of the freedom of the press … It is time that the pendulum swung back to a different kind of balance between what is private and secluded and what is public and unshielded."

One can understand how that would be a red rag to your average journalist. But it would be necessary, if "re-calibration" is to be attempted *in either direction*, to reconcile the exercise with the words of the Council of Europe to which I referred earlier, to the effect that these rights are neither absolute nor in any hierarchical order, since they are of equal value. That has been emphasised subsequently in this jurisdiction on the highest authority: see e.g. *Re S (A Child).*

Another point made before the Committee was that, where a dispute arises between citizens (e.g. between a journalist and a member of the public), as to where the public interest lies in a particular set of circumstances, judges are not fit to resolve that issue. Why? Because they all come from privileged backgrounds. Actually, of course, that is simply untrue, but it is irrelevant any way. What matters about the argument is its logical conclusion if judges are taken out of the equation and editors are, presumably, to be left to decide; namely, that where such a dispute arises one party (i.e. the member of the public) shall have no access to justice, while the other (the journalist) has the exclusive right to resolve it in his or her own favour. We shall have to see if that commends itself to the Select Committee.

Back in 1990, at the time of the Calcutt Report, it seemed natural to prefer the legislative route, partly because it is generally right, as a matter of principle, that fundamental changes in the law should indeed be left to Parliament to debate. Secondly, for the kind of reasons Sir Nicolas Browne-Wilkinson had in mind in his address in 1988, I thought we needed a clear framework of principle set out, so as to achieve as much consistency as possible. As the years have gone by, however, I am less persuaded that such drafting would represent an improvement on what has evolved on a case by case basis. It matters not what my personal impression may be, but it is perhaps of some significance that the House of Lords refused permission to appeal in those four cases I mentioned.

The point I want to make is simply that, whether the principles are set out in a statute or merely in the Convention itself, the fact remains that there is no touchstone by reference to which the questions thrown up by each new case that comes along can be answered. There is no substitute for a balancing act to be carried out on those facts.

After the full significance of the *Naomi Campbell* and *Von Hannover* cases began to be appreciated, decisions came rapidly along on a wide range of completely unpredictable facts. A pattern began to emerge which reduces the inhibiting effects of uncertainty. The practical application of the general principles was worked out remarkably quickly. It became increasingly possible for in house lawyers to make a judgment on where the lines are to be drawn. Of course, the "intense focus" has to be applied to the individual facts of the case, but at least the reasoning processes by which these decisions are reached are identified in the judgments and the various factors that are being weighed in the scales. As these became familiar, journalists and their in house lawyers were able to predict outcomes more readily and the understandable worries about uncertainty should have diminished.

This no doubt helps to explain why contested applications have now significantly reduced in volume. True it may be that one sees privacy applications made or threatened at the rate of about one a week, but they now seem to be disposed of on the basis of agreed undertakings. If ever a genuine public interest argument were to arise, the issue would have to be resolved by the court. But, as experience shows, that is likely to occur only infrequently. One case where it was raised, and in which the newspaper concerned (the *Mail on Sunday*) met with a measure of success, was that of *Lord Browne of Madingley.* As the editor of the *Guardian* observed to the Select Committee on 5 May this year, he would become more concerned about the developing law of privacy as and when it stifles a genuine public interest issue. So far, most of the cases where injunctions have been granted have concerned matters of sexual or otherwise obviously personal revelations.

Now that a corpus of principles and sub-principles is being built up specifically with reference to privacy, how does it interrelate with the longer established set of rules now conjoined with it under the Article 8 umbrella? I refer of course to the law of defamation. I can offer some preliminary thoughts:

a) There is clearly going in many cases to be an overlap: see e.g. the *Mosley* case.
b) It is likely to be significantly easier to obtain an interlocutory injunction on privacy grounds (provided, of course, the subject of the proposed coverage

gets wind of a publication). That is because the test under s.12(3) of the Human Rights Act is whether the applicant is likely to succeed at trial. In most cases of tabloid gossip, that will be a relatively straightforward question to resolve. Even in the rare cases in which a public interest point is raised, that can probably be judged without having to determine contested issues of fact.

c) By contrast, at least for the moment, the *Bonnard v Perryman* rule still applies to a claim brought in defamation, so that all a defendant normally has to do in order to avoid injunctive relief is to establish a *bona fide* intention to plead justification.

d) In a privacy claim truth does not provide a defence as it obviously does in defamation: see *McKennitt v Ash* [2008] QB 73. That is because the mischiefs to which the two wrongs are directed are quite different. Accuracy provides a complete defence in defamation cases because one is not entitled to maintain a false reputation. In privacy cases, by contrast, accuracy is beside the point. The wrong consists of intrusion into personal areas of one's life.

e) Interesting questions may arise in the context of interlocutory injunctions. Suppose the proposed publication is defamatory as well as an infringement of privacy. Does it matter that by framing his claim in privacy the claimant would appear to be able to circumvent the effect of the *Bonnard v Perryman* doctrine? Let us suppose, for example, that the allegations related to some long distant misconduct in respect of which the claimant could by now be said to have a reasonable expectation of privacy. How does this inter-relate to the Rehabilitation of Offenders Act 1974?

f) So too, in privacy cases, one does not have to confront the vagaries, uncertainties and additional expense of jury trial.

g) There is at least the theoretical possibility of obtaining public funding for a privacy claim, although the likelihood nowadays is that an impecunious claimant would be able to negotiate a CFA.

h) If the claim is brought in privacy it is clearly as a matter of principle inappropriate to include any compensation for injury to reputation, whereas that is one of the main elements in an award of libel damages. I naturally recognise that sometimes it will be difficult to distinguish the matter of hurt feelings from that of injury to reputation (a distinction one does not have to draw too precisely in the average libel case).

i) It appears at the moment that exemplary (or punitive) damages will not be recoverable in privacy cases, although that proposition so far is based merely on first instance authority. Moreover, the editors of the newly published edition of *McGregor on Damages* take the view that, in an appropriate case, exemplary damages would and should be recoverable.

There are currently a number of important questions affecting freedom of speech that will soon require to be resolved either in our own courts or in Strasbourg. To give just three examples:

(1) To what extent is there a margin of appreciation in the various domestic jurisdictions to allow, as Patten J would have allowed in the JK Rowling case, a degree of latitude for photographs to be taken in public places in the absence of harassment?

(2) Is *Bonnard v Perryman*, as recently confirmed by the Court of Appeal in *Greene v Associated Newspapers*, compatible with the principle recognised in the Council of Europe's 1998 resolution (as well as by the House of Lords in *Re S*) that no one Convention right takes automatic precedence over any other? After all, the rule in *Bonnard v Perryman* would appear to accord automatic priority to Article 10 over Article 8.

(3) Should there be an enforceable right to be notified when an infringement of privacy is about to take place? This is a matter which is likely to be addressed on Mr Mosley's application to Strasbourg as and when it comes to be adjudicated upon. It has been argued by Professor Gavin Phillipson in the first issue of the *Journal of Media Law* that there should be such a right. Otherwise, Article 8 rights could not be effectively protected. Moreover, he suggests such a right would be compatible with the approach taken in Strasbourg. The article is entitled *Mr Mosley goes to Strasbourg* and repays careful reading.

All this is for the future. Meanwhile, however, it is probably fair to say that at least much of the uncertainty has been removed. Journalists and their advisers would now have a clearer appreciation of the boundaries on privacy – especially so far as sexual relationships and matters of health are concerned. That is to say, they should not ordinarily be covered in the press without consent or some genuine public interest to justify it. Everyone would now at least appreciate, without even having to consult their lawyer, that what the Court of Appeal thought unacceptable in the *Gordon Kaye* case is today actually unlawful and will give rise to an enforceable cause of action. It is perhaps worth noting in this context the recent report published by the Reuters Institute for the Study of Journalism, based in Oxford. The authors, Stephen Whittle and Glenda Cooper, concluded:

> "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".

Is there a downside in the sense that recent developments on privacy in the English courts have brought about a "chilling effect" in respect of investigative journalism? There is no evidence of this as yet. Indeed, the decision of the Court of Appeal in *Lord Browne of Madingley* would suggest that wherever there arises a genuine public interest the court will not intervene by way of injunction. I referred earlier to the sanguine view expressed about this by the editor of the *Guardian* before the Select Committee. Whittle and Cooper reached a similar conclusion in the Reuters report. They were of opinion that the only "chilling effect" was upon those in the business of "kiss and tell".

I adverted briefly at the outset to other common law jurisdictions. One should guard against insularity. It is sometimes helpful to put these debates in context and it needs to be recognised that it is not just in our jurisdiction that this is a matter of topical interest. It seems that the value to be attached to personal privacy is seen as an important issue in other parts of the world. It is naturally being discussed in Ireland,

which also has to take account of Article 8, but also in Australia and New Zealand, where the Convention obviously has no direct application. I received earlier this year the Stage 3 report of the New Zealand Law Commission entitled *Invasion of Privacy: Penalties and Remedies*, a thorough piece of work which shows the importance being attached in that jurisdiction to the very same values we have been discussing. It is thus clear that it is not merely the United Kingdom that is having to give weight to these matters, as an unforeseen by-product of what one editor has called "the wretched Human Rights Act", as is sometimes suggested. It is part of a much wider consciousness in modern societies that something has to be done to protect what is (in Lord Hoffmann's words) "an aspect of human autonomy and dignity".