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Privacy After Max Mosley:

A Practical Summary of the New Privacy Law

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1. The law protecting personal (or private) information from misuse or unauthorised disclosure has developed rapidly but there remains no general tort of invasion of privacy as such. The protection given to private information is in recognition of an individual's right to control how and to what extent information about oneself is published¹. The aim of this summary is to present a practical guide to the law's development having particular regard to the most recent authorities which have helped to clarify and settle the law in this area, especially Max Mosley's case². Personal information must be contrasted with non-personal information such as commercial or government secrets. Whereas non-personal information continues to be protected by the traditional equitable claim for breach of confidence personal information is now protected by a new regime which is referred here as the (new) privacy law.
2. The law took a new direction when it was required to give added protection in cases where personal information was misused or wrongfully disclosed in violation of the right of privacy which was guaranteed by Art 8 of the ECHR³.

1 Report of the Committee on Privacy, 1972 Cmnd. 5012 p 10.

2 *Mosley v MGN* [2008] EWHC 1777 Eady J who emphasised that he was not laying down new law merely applying the law as it had developed. He said [234] that it was not a landmark decision but simply the application to rather unusual facts of recently developed but established principles.

3 European Convention on Human Rights and Fundamental Freedoms.

Under the HRA⁴ effect had to be given to the right to privacy (guaranteed by Art 8 of the ECHR) and the right to freedom of expression (guaranteed by Art 10 of the ECHR). These values are as much applicable in disputes between individuals, or between an individual and a non-governmental body such as a newspaper, as they are in disputes between individuals and a public authority⁵.

3. The traditional equitable claim for breach of confidence has been transformed in order to extend protection to private information (regardless of whether it is confidential) so as to give effect to Art 8. Before these events breach of confidence traditionally afforded umbrella protection to both personal and non-personal information. The ways in which these two types of information are protected are now different. To distinguish them claims in respect of personal information are now better described as breach or invasion of privacy and as governed by the new privacy law.
4. Breach of confidence traditionally protected information in situations where there was a pre-existing confidential relationship, situation or transaction. Protection was later extended to information of a confidential nature regardless of any pre-existing relationship of confidence. Breach of confidence claims were always subject to public interest considerations (eg the disclosure of iniquity). The criteria used in traditional breach of confidence claims continue to be relevant when a claim is pursued under the new privacy law. In *Mosley*⁶ it was said that the claim was partly founded, as in

4 Human Rights Act 1998.

5 See Lord Nicholls [17] - [18] and Lord Hoffman [50] in *Campbell v MGN* [2004] 2 AC 457. The HRA, therefore, has horizontal effect – ie it applies human rights law to actions between individuals, in contrast to actions brought against public authorities.

6 Eady J in *Mosley v NGN* *ibid* at [6].

*McKinnitt v Ash*⁷ upon “...old fashioned breach of confidence by way of conduct inconsistent with a pre-existing relationship, rather than simply of the purloining of private information”. This is important because it shows that practitioners continue to bring claims in respect of wrongful disclosure of personal information (where appropriate) for breach of confidence in addition to invasion of privacy on the same facts. The courts tend to treat such dual claims as one cause of action although the claim is stronger if a breach of confidence can be established.

5. Traditional breach of confidence and the new privacy law are sometimes described as separate torts but this has not always met with approval. They are now separate limbs of breach of confidence and different rules apply to each limb depending on whether personal or non-personal information is in issue. The new privacy law extends and modifies traditional breach of confidence (in relation to personal information). Traditional breach of confidence primarily enforces obligations imposed on parties to confidential relationships (or, at any rate, in situations where confidential information was in issue) whereas the new privacy law protects individuals’ rights over private information.
6. The modern perception is that it is as much in the public interest to uphold the right to privacy as it is to uphold the right to freedom of expression. When these two rights are in conflict (as they are in any privacy claim) there is a contest between two competing public interests and the court is concerned to reach a result which best serves the overall public interest.
7. Under the new privacy law personal information qualifies for protection once it is established that the claimant has a reasonable expectation of privacy in respect

7 [2008] QB 73 per Buxton LJ [8].

of it assuming the claimant to be a person of ordinary sensibilities. Art 8 is then said to be engaged and at that stage the court goes on to undertake a balancing exercise to determine whether the right to privacy or the right to freedom of expression should prevail in any given set of circumstances. The right to privacy and the right to freedom of expression are not absolute rights. They exist in direct relationship with each other in the sense that effect is given to one (if given at all) at the expense of the other. Essentially, privacy claims involve competing assertions of the right to privacy and of the right to freedom of expression.

8. English law provides limited protection in respect of the invasion or violation of an individual's personal space. Personal information is often acquired by such an invasion or violation (eg surveillance, clandestine recording or use of a telephoto lens). Although the invasion or violation may not found a claim *per se* they might be relevant to whether Art 8 is engaged because the sort of information obtained by clandestine recording is easily categorised as private and individuals invariably would reasonably expect to keep it so. The new privacy law is, therefore, concerned with the misuse of *information* not, save indirectly, with the actual invasion or violation of personal space that might take place in order to acquire it. It has been said in the *Mosley* case to be fairly obvious that the clandestine recording of sexual activity on private property must be taken to engage Art 8 in respect of the information recorded⁸. This is obvious now but it might not have been so obvious when the new privacy law was under development.
9. Privacy claims are thus subject to a two stage test:
 - a. Stage 1: Is Art 8 engaged? (Has the claimant a reasonable expectation of

privacy in respect of the information?) And if Art 8 is engaged:

- b. Stage 2: In a balancing exercise between the right to privacy and the right to freedom of expression (which may have to yield to other rights) which right should prevail?
10. At stage 1 it is normally obvious whether an individual has a reasonable expectation of privacy in respect of information. Where it is not so obvious it will be necessary to consider various factors which might be relevant such as whether the individual courted publicity in respect of that area of his private life. It was said in *Mosley* that generalisations are best avoided, just as at stage 2, and the question must be addressed in the light of all the facts⁹. When the new privacy law was developing there was a tendency to resort to generalisations. *Mosley* has assisted in clarifying other areas too as the following statements illustrate. "Public figures" are entitled to a private personal life and this extends beyond sexual activities to personal relationships generally¹⁰. People's sex lives, for example, are to be regarded as essentially their own business¹¹. Those who participate in sexual or personal relationships may be expected not to reveal private conversations or activities¹². Drug dependency is a matter which an ordinary person might want to keep private¹³. As to ordinary day to day activities it is difficult to draw a distinction between family

9 Eady J in *Mosley v NGN* *ibid* at [98].

10 Eady J in *Mosley v NGN* *ibid* at [101].

11 Eady J in *Mosley v NGN* *ibid* at [100].

12 Eady J in *Mosley v NGN* *ibid* at [105].

13 Eady J in *Mosley v MGN* *ibid* at [119].

8 Eady J in *Mosley v NGN* *ibid* at [104].

and sporting activities (an individual's private recreation time¹⁴) and something as simple as a walk down the street or a visit to the grocers to buy milk. It has been said that an expedition to a cafe is at least arguably part of an individual's recreation time intended to be enjoyed as such and that publicity of it is intrusive and such as adversely to affect such activities in the future¹⁵. It all depends on the facts.

11. At stage 2 there is an intense focus on the facts relevant to each side of the scales in the balancing exercise. The right to privacy and the right to freedom of expression are given equal weight. It is the weight accorded to the factors thrown into the balance on both sides that matters because it is a proportionate balancing exercise. Practitioners and the courts must exercise careful judgment to determine which factors carry the greatest weight. Each piece of information needs to be focussed upon to determine whether there are compelling reasons why it ought, in the public interest, to be disclosed. The court must consider whether publication pursues a legitimate aim and whether the benefits are proportionate to the harm which might occur interfering with the right of privacy.
12. Whether or not publication of information or matter may be "highly offensive" is relevant, if at all, to issues of proportionality when the balance is struck between Art 8 and Art 10¹⁶ and is not relevant to whether Art 8 is engaged. If the publication of private information would be "highly offensive" there would have to be a strong public policy reason why publication should be allowed.

14 Which would be protected if *Von Hannover* (2005) 40 EHRR 1 were applied - on the basis that publicity about such activities is intrusive and can adversely affect the exercise of such social activities.

15 Sir Anthony Clarke MR in *Murray v Big Pictures* [2008] EWCA 446 at [55].

16 See Sir Anthony Clarke MR in *Murray v Big Pictures* [2008] EWCA 446 referring to Lord Nicholls in *Campbell v MGN* *ibid* at [22].

13. The balancing exercise thus entirely depends on the facts in any particular case. Once the right to privacy is established it is clear that there must be some countervailing consideration of public interest which may be said to justify any intrusion¹⁷. Broad generalisations about how the balancing exercise should be carried out are of little use because the exercise depends on the facts. The court must balance the public interest in disclosure of information against the public interest in maintaining privacy in individual's lives. In *Re S (A Child)*¹⁸ it was held (applying the principles in *Campbell v MGN*) that four principles applied to the interplay between Art 8 and Art 10: (1) That neither article took automatic precedence over the other (2) That where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in each case is necessary (3) That the justifications for interfering with or restricting each right must be taken into account and (4) That the proportionality test must be applied to each right.
14. It has been said (and underlined in *Mosley*) that it in assessing the relative worth of competing rights, it is not for judges to make individual moral judgments or to be swayed by personal distaste. It is not simply a matter of personal privacy versus the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of the conflicting public interest considerations (privacy versus freedom of expression) and evaluating them according to increasingly well recognised criteria¹⁹.

17 This has been described as the new methodology by Eady J in *Mosley v NGN* [2008] EWHC 1777 [11] citing *Re S (A child)* at [23] per Lord Steyn.

18 [2004] UKHL 47.

19 Eady J in *Mosley v NGN* *ibid* at [130].

15. One of the main features of *Mosley* is to underline the fundamental importance of the courts upholding duties of confidence. It is in the public interest, for example, that contractual terms restricting disclosure of information and duties of confidence are generally held to be sacrosanct. They must be given great weight in privacy claims. It was said earlier that: *“Whether a publication, or threatened publication, involves a breach of a relationship of confidence, an interference with privacy or both, it is necessary to consider whether these matters justify the interference with Art 10 rights that will be involved if the publication is made the subject of judicial sanction. A balance has to be struck. Where no breach of a confidential relationship is involved, that balance will be between Art 8 and Art 10 rights and will usually involve weighing the nature and consequences of the breach of privacy against the public interest, if any, in the disclosure of private information...where the disclosure relates to “information received in confidence” ...it would be surprising if this consideration was ignored...It is a factor that Art 10(2) recognises is, of itself, capable of justifying restrictions on freedom of expression”*²⁰.
16. In practice if a breach of confidence is established (eg violation of a confidential relationship or breach of a contractual term) a claim cannot realistically be defended simply on the basis of the competing right to freedom of expression. This is where *Mosley* is particularly illuminating. It was said that to defend the claim would require establishing that one of the “limiting principles” comes into play²¹ in particular the public interest that confidences should be preserved and protected by the law and may be outweighed only by some other public interest favouring disclosure.

20 *HRH Prince of Wales v Associated Newspapers Limited* [2006] EWCA 522 [65].

21 Eady J in *Mosley v NGN* *ibid* [131] citing Lord Goff in *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109 282 B-F.

17. Thus it has been said that if the court identifies an infringement of an individual’s Art 8 rights (in particular in the context of freedom to conduct sex life and personal relationships) it is right to afford a remedy and to vindicate that right and that the only permitted exception is where there is a countervailing public interest which in the particular circumstances is strong enough to outweigh it; that is to say because one at least of the established limiting principles comes into play²² eg (1) the exposure of illegal activity (2) to prevent the public from being seriously misled by public claims which turn out to be untrue and (3) because the information would make a contribution to a debate of general interest. The press and broadcast media must take note of this.
18. The defence of iniquity fits within these “limiting principles” and is not restricted to crimes but extends to all matter which it is in the public interest to disclose. It must be noted that the public interest might well be satisfied with limited disclosure (and not necessarily disclosure to the media). If so, it will not be in the public interest to exceed that limit. This means to practitioners and the courts that each piece of information needs to be assessed to determine whether the public interest really requires that it should be disclosed at all or in the manner in which it is intended it will be disclosed.
19. One area that required clarification was the extent to which right to privacy extended to sexual activity. It was said in *Mosley* that where the law is not breached the private conduct of adults is essentially no-one else’s business. Put simply, if it is not illegal it is no one else’s business. The fact that a particular relationship happens to be adulterous, or that someone’s tastes are unconventional or “perverted” does not

22 Eady J in *Mosley v NGN* *ibid* at [131].

give the media carte blanche²³. It was said in *Mosley* to be highly questionable whether in modern society the concept of iniquity can be applied to sexual activity, fetishist or otherwise, conducted between consenting adults in private²⁴. Even in the case of criminal activity some limits must be placed on intrusion into privacy and such intrusion must be no more than is proportionate²⁵. Further, even those who have committed serious crimes do not thereby become “outlaws” so far as their own rights, including the right of personal privacy, are concerned²⁶.

20. The defendant’s state of mind is probably not relevant to the issue of public interest, so whether the defendant knew that, for example, a crime had been committed at the time of the invasion is not relevant to whether a public interest defence is available²⁷. It was suggested in *Mosley* that there may be a case for enquiring, when public interest has to be considered in the field of privacy, whether a journalist’s decision to publish was reached as a result of carrying out enquiries and checks consistent with “responsible journalism”²⁸.
21. The ultimate balancing test has been recognised as turning upon proportionality: Is the intrusion into the claimant’s privacy proportionate to the public interest

23 Eady J in *Mosley v NGN* ibid at [128].

24 Eady J in *Mosley v NGN* ibid [106].

25 Eady J in *Mosley v NGN* ibid at [110].

26 Eady J in *Mosley v NGN* ibid at [118].

27 Eady J in *Mosley v NGN* ibid at [112] where it was said that there is no authority as yet for the proposition that a defendant’s mind in a privacy case, is relevant to the issue of public interest at all.

28 Eady J in *Mosley v NGN* ibid at [141].

served by the disclosure²⁹? Although there might be a public interest in disclosing information it does not follow that the public interest requires the publication of photographs or other visual images showing “every gory detail”³⁰. The court can still restrain the publication of a photograph even if the information it depicts is already in the public domain³¹. The Court of Appeal has said that photographs in some circumstances can enable the viewer to act as voyeur and as a means of invading privacy photographs were particularly intrusive³². It has been recognised that provided publication is justifiable in the public interest journalists must be given reasonable latitude as to the manner in which information is conveyed to the public³³. It is all a question of proportionality.

22. The new privacy law is distinct from defamation (which protects reputation and is concerned with false information). The truth or falsity of the information is irrelevant when deciding whether it is private³⁴. Defamation cannot protect privacy because truth is a complete defence save where publication portrays an individual in a false light as in *Tolley v J S Fry & Sons Ltd (1931)*³⁵. The rule in *Bonnard v Perryman*³⁶ precludes interlocutory restraining relief in defamation

29 Eady J in *Mosley v NGN* ibid [14] citing Sedley LJ in *Douglas v Hello* [2001] QB 967.

30 Eady J in *Mosley v NGN* ibid [16] and see *Theakston v MGN* [2002] EMLR 22.

31 Waller LJ in *D v L* [2004] EMLR 1 at [23] cited by Eady J in *Mosley v NGN* ibid at [18].

32 *Douglas v Hello (No 3)* [2006] QB 125 at [85].

33 *Campbell v MGN* [2003] QB 633 CA per Lords Phillips at [64].

34 Longmore LJ in *Ash v McKennitt* [2006] EWCA Civ 1714.

35 [1931] AC 333.

36 *Woodward v Hutchins* [1977] 1 WLR 760 CA.

cases where the defendant proposes to justify. This rule should not be sidestepped by bringing privacy claims where defamation is more appropriate³⁷ although in most cases if information is “private” it should be possible to restrain its publication.

23. The main areas of clarification given in *Mosley* in summary are in emphasising (1) that Lord Goff’s limiting principles³⁸ and the defence of iniquity remain of relevance in privacy claims where a breach of confidence is established (2) that different rules apply to photographs than to other types of information³⁹ (3) that not all the salacious details need to be published in the public interest⁴⁰ (4) that journalists should be given reasonable latitude about what they publish and how they publish it⁴¹ (5) that a right to privacy could still sometimes be expected even in a public place⁴² (6) that generalisations are best avoided when deciding whether there is a reasonable expectation of privacy⁴³ (7) that people’s sex lives are essentially their own business⁴⁴ (8) that even public figures are entitled to a private personal

37 This might be thought to be an abuse of process – see *Ash v McKennitt* [2006] EWCA Civ 1714 [79].

38 *AG v Guardian Newspapers (No2)* [1990] 1 AC 109 at 282 B-F. And see *Mosley* at [13].

39 Eady J in *Mosley v NGN* *ibid* at [16].

40 Eady J in *Mosley v NGN* *ibid* at [20].

41 Eady J in *Mosley v NGN* *ibid* at [21].

42 Eady J in *Mosley v NGN* *ibid* at [22].

43 Eady J in *Mosley v NGN* *ibid* at [98].

44 Eady J in *Mosley v NGN* *ibid* at [100].

life⁴⁵ (9) that clandestine recording of sexual activity on private property must be taken to engage Art 8⁴⁶ (10) that it is highly questionable whether iniquity can be said to apply in modern society to sexual activity conducted between consenting adults in private⁴⁷ (11) that even those who have committed serious crimes do not thereby become “outlaws” so far as their own rights of personal privacy are concerned⁴⁸ (12) that it is not for judges to make individual moral judgments or be swayed by personal distaste and it is not simply a case of privacy versus the public interest because the modern perception is that there is a public interest in respecting personal privacy⁴⁹ (13) that where the courts identify an infringement of a person’s Art 8 rights, and in particular in the context of his freedom to conduct his sex life and personal relationships as he wishes, it is right to afford a remedy and to vindicate that right and the only permitted exception is where there is a countervailing public interest which is strong enough to outweigh it⁵⁰ (14) that there may be some scope for paying regard to the concept of “responsible journalism” and whether enquiries and checks consistent with that have been carried out⁵¹ (15) that exemplary damages are not available in privacy cases⁵².

45 Eady J in *Mosley v NGN* *ibid* at [101].

46 Eady J in *Mosley v NGN* *ibid* at [104].

47 Eady J in *Mosley v NGN* *ibid* at [106].

48 Eady J in *Mosley v NGN* *ibid* at [118].

49 Eady J in *Mosley v NGN* *ibid* at [130].

50 Eady J in *Mosley v NGN* *ibid* at [131].

51 Eady J in *Mosley v NGN* *ibid* at [141].

52 Eady J in *Mosley v NGN* *ibid* at [197].

24. The law has gone some way to developing principles protecting an individual's right of privacy guaranteed by Art 8 but there is further to go. There is increased recognition that even celebrities and public figures have a right to a distinct and protected private life and that eating into their private space cannot be justified by simple reliance on somewhat irrational generalisations such as "courting publicity" or "acting as a role model". *Von Hannover* is likely to have increasing influence on the development of English privacy law.

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Autumn 2008

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Robert Deacon has broad experience in chancery, commercial and business related civil litigation with specialist knowledge in intellectual property and media and entertainment. His expertise extends to banking and guarantees, partnership, construction, fraud and asset tracing and professional negligence. Primarily known as a litigator he has undertaken many heavily contested often high profile trials and devoted a substantial part of his practice to specialist advice work. He is an experienced interlocutory litigator particularly in relation to freezing and search orders and other interim remedies.



His intellectual property practice ranges from trade marks to copyright, patents and design right work and he has extensive experience of defamation and privacy claims. He has chaired and for some years delivered lectures at the annual intellectual property law and sports law conferences for London Legal Training. His lecture topics have included privacy and image rights, performers' rights, performers' royalties, database rights and freedom of movement of goods. Recently he was awarded the prestigious post graduate diploma in Intellectual Property Law and Practice from Bristol University. Robert is always on hand to guide clients through all types of knotty intellectual property law problems particularly the maze of design right rules and regulations.

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