

A CASE OF THE HIGHEST AUTHORITY... SO WHAT DOES IT MEAN?

*Sir David Eady**

There has been for some time a widespread view that anyone under investigation with regard to suspected wrongdoing should be entitled to anonymity prior to charge. Yet no attempt has been made to legislate. The matter is governed currently by the recently developed law of privacy, deriving from such cases as Campbell v MGN Ltd and culminating in the decision of the Supreme Court in ZXC v Bloomberg LP. It seems to be accepted, not only in England but under human rights law generally, that such information should be regarded as "private". This has not seriously been undermined in any of the leading cases. There is surely a serious question as to whether a suspect does indeed have a reasonable expectation that there should be such a blanket over his or her identity. This information is not purely personal. It relates to suspected wrongdoing – information which legitimately concerns not only any individual under suspicion but also, for example, "victims" and no doubt other fellow citizens interested in getting to the truth and in the administration of justice. Naturally, if a suspect's name leaks out, that individual's reputation may be seriously damaged. Some take the view that compensation should be recoverable specifically for injury to reputation – even though the claim would not be brought in defamation. Yet privacy and libel are distinct causes of action with different purposes to fulfil. If damages are to be sought to vindicate reputation, it is hard to see why a defendant should not have available the traditional defences and other principles applying in defamation. If a claimant wishes to demonstrate that the allegations are false, as well as intrusive, why should he not be subject to the same disciplines and risks as one who sues in libel?

Lawyers are supposed to avoid in-house jargon. We are no longer allowed, for example, to speak of *Mareva* injunctions or *Anton Piller* orders. Yet, if you are unlucky enough to become embroiled in a libel action, you may well find yourself listening to passionate argument between counsel as to whether the words complained of are to be characterised (say) as "*Chase* Level Two" or "*Chase* Level Three". It is, after all, upon the outcome of such heated debates that will turn such important questions

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as how seriously the defamatory words are to be taken (by the reasonable reader) and how much they are worth by way of damages. This terminology is often used in that context.

The name derives from a case called *Chase v News Group Newspapers Ltd*,¹ in which the Court of Appeal discussed three possible levels of gravity when addressing the words complained of in a libel action – not, of course, an exhaustive list but often convenient because between them they reflect most categories of possible defamatory allegations. The phrase "Chase Level One" is used when categorising the most serious of allegations; that is to say, where the words are accusing the claimant of actually being *guilty* of some disreputable conduct. "Chase Level Two", however, serves as shorthand for the less serious imputation that there are merely *reasonable grounds to suspect* the person concerned. The final category is "Chase Level Three". This is equivalent to the least serious allegation, to the effect that there are *grounds worth investigating* – to see whether the claimant was implicated in wrongdoing of some kind.

These distinctions are potentially significant in the context of the debate as to whether a person suspected of criminal activity should be entitled to anonymity prior to being charged. If not, there will almost certainly be damage done to that suspect's reputation by reason of the fact that some people will jump to a conclusion about his involvement – perhaps that there are reasonable grounds to suspect him of committing the relevant crime, or perhaps only that there are grounds to investigate. This dispute rumbled on for several years, but has now apparently been resolved by a decision of the Supreme Court handed down on 16 February 2022. This was the case of *ZXC v Bloomberg LP*.²

Should such a person be able to protect himself against adverse pre-charge publicity and, if so, by what legal mechanism? The primary focus was upon the recently developed cause of action formally described as "misuse of private information" (known generally as MOPI or sometimes simply as "breach of privacy"). This is perhaps ironic, since the introduction of this new cause of action had itself been somewhat controversial, especially in tabloid newspapers – not least because of the rapid judicial development since its formulation by their Lordships in Naomi Campbell's case nearly 20 years ago.³

The tabloid reaction may have been a little overdone, however, since despite a few high-profile cases there has not exactly been a stampede in the writ office. (Official figures published by the Ministry of Justice show that there were 41 new privacy claims launched in 2020, only 20 in 2021 and 22 in the following year.) Yet, it may be argued, the mere fact of its availability has had a markedly inhibiting effect on "kiss and tell", and thus undermined the character of popular journalism. Indeed, the United Kingdom Government has vowed to correct the balance by legislating, on the basis that

1 *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772.

2 *ZXC v Bloomberg LP* [2022] UKSC 5, [2022] AC 1158.

3 *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

judicial activism represents a threat to freedom of speech. Blame is also attached to the content of the European Convention on Human Rights (ECHR) and to the baleful influence of Strasbourg. The Government claimed at one stage that it is not appropriate merely to "balance" art 8 interests against art 10: they would ensure that free speech attained a built-in priority. How this could be achieved, compatibly with the United Kingdom's duties as a long-term signatory of the Convention, has not so far been spelt out. (The latest news is that the issue has been confined to the back burner.)

It is not that the Government values "kiss and tell" for its own sake. They are impressed, rather, by the *cris de coeur* from proprietors to the effect that the very existence of a vibrant and varied media market is threatened by a law of privacy. Investigative journalism too will be inhibited by threats from the "rich and famous" and their pleas for privacy.

At all events, it is this new "judge-made" law of privacy that provides the mechanism by which suspects can now confidently seek to implement their claims to anonymity, as expounded by the Justices in *Bloomberg*. It is important to note how they described the social purpose of this form of claim: it was *not* to be confined to the protection of an individual from the publication of information which is untrue, but rather to protect, more generally, a claimant's private life in accordance with art 8 of the ECHR.⁴ It was compared and contrasted with the long-established tort of defamation, and was characterised as "a separate, distinct and stand-alone tort".⁵ It is now regularly described as a tort although, in so far as it matters, that is still an issue of some academic debate. It seems to have derived, albeit under the stimulus of art 8 of the ECHR, from the notion of confidentiality associated especially with the doctrines of equity.⁶ But it is not subject to some of the limitations associated with an "old-fashioned"⁷ claim for breach of confidence. For example, it does not depend upon there being a duty of confidence between the parties. Nor does the material in question have to be inherently confidential itself. Despite its close connection with the ECHR, one of the advantages is the availability of this type of claim as between individuals (and indeed as between individuals and non-governmental bodies such as the media). It is not confined to disputes between individuals and the state.⁸

Unlike defamation, the new law of privacy regards the subject matter of the allegations as of central importance: that is to say, whether it falls within the protection of art 8. The court is thus not so much concerned with their truth or falsity.⁹ If a claimant were seeking to prevent the publication of details about his health or his personal relationships, and he had to reveal the true facts one way or

4 *ZXC v Bloomberg LP*, above n 2, at [111].

5 At [111].

6 See for example *Prince Albert v Strange* (1849) 2 De G & Sm 652, 64 ER 293.

7 An expression used by Buxton LJ in *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73 at [8].

8 *Campbell v MGN Ltd*, above n 3, at [14]–[17] and [50].

9 *McKennitt v Ash*, above n 7.

the other, that would be intrusive in itself: the litigation would have served no purpose. In a libel action, on the other hand, provided the allegations published or sought to be published are defamatory, then the defendant will have the right to plead truth (formerly "justification") by way of defence. If the defamatory "sting" of the words is shown to be true, then it would follow, as a matter ultimately of public policy, that the claimant is not in this respect entitled to the reputation he is seeking to vindicate or protect. In a privacy context, the truth of the information is seen to be irrelevant. But suppose the allegations are also defamatory (as in *Bloomberg*). It is difficult to see why the public policy should be turned on its head simply because a claimant has chosen to sue on grounds of privacy. Indeed, there are a number of long-established protections for free speech woven into the fabric of libel law that we shall need to consider in the light of the *Bloomberg* decision.

The case brought to the fore the central issue of whether a person under investigation and/or suspicion of involvement in criminal activity should be entitled to anonymity or privacy prior to the moment when he is charged. Much public sympathy had been generated for Cliff Richard when he had been widely exposed by the BBC, in particular, as being suspected of involvement in serious criminal offences and as having been subjected to a humiliating search of his home.¹⁰ No charges were ever brought, but he is likely always to be associated in the public memory with those offences even though entirely innocent – and even though he triumphed in the outcome of his privacy claim. It was later recognised in *Bloomberg*:¹¹

... that reputational and other harm will ordinarily be caused to the individual by the publication of such information. The degree of that harm depends on the factual circumstances, but experience shows that it can be profound and irremediable.

Had it been appreciated more widely at the time that Sir Cliff was entitled to privacy prior to a charge being brought, no one need ever have known that he had come under suspicion.

Needless to say, there was rather less public sympathy in evidence when, in May 2022, it was a (Conservative) Member of Parliament who fell under suspicion. Although it was said that he could not be named "for legal reasons", there were loud cries for openness and against "establishment cover ups". Nevertheless, for the moment, it seems reasonably clear that a suspect will usually be able to postpone adverse publicity by launching a privacy claim – subject, of course, to having the necessary funds. (In practice, of course, it will generally be difficult to keep the lid in place once social media begin to probe. This was illustrated in July 2023 by the notorious case of a BBC announcer and commentator who was being widely named online as the senior employee alleged to have paid large sums of money to a junior member of staff in return for intimate photographs.)

¹⁰ *Richard v British Broadcasting Corporation* [2018] EWHC 1837 (Ch), [2019] Ch 169.

¹¹ *ZXC v Bloomberg LP*, above n 2, at [109].

The ingredients of such a claim may be stated fairly simply. Stage 1 involves an enquiry as to whether the claimant can establish a reasonable expectation of privacy in respect of the facts disclosed.¹² That will very often turn upon the nature of the personal information itself (where it relates, for example, to a claimant's health or personal or sexual relationships),¹³ although sometimes it may depend more on the circumstances in which it was obtained or imparted. It does not matter, for this purpose, whether the information is true or false.¹⁴ Only if this initial question is answered positively, and the subject matter is held to be prima facie within the scope of privacy, will the enquiry move to the second stage.

Stage 2 requires the court to carry out a balancing exercise with regard to the rights of the claimant as against those of the person seeking to use or publish the relevant information. Most commonly, this will involve weighing the competing rights under arts 8 and 10. Has it been demonstrated that the claimant's privacy rights have been, in the particular circumstances, outweighed by a public interest in the information being more widely communicated? Proportionality will, of course, be important in that exercise.

It is clear that certain aspects of the *Bloomberg* decision are going to have a significant impact on future privacy cases at both Stages 1 and 2. It is plainly a case of the highest authority. Not only was it a unanimous decision of the Supreme Court, but it upheld a unanimous Court of Appeal who, in turn, had upheld the first instance Judge. It contains an important exposition of the modern law of privacy in this jurisdiction. True, it was influenced in part by earlier rulings of the Court in Strasbourg. That is hardly surprising. Indeed, Buxton LJ in *McKennitt v Ash*, cited above, went so far as to recognise that we are now entitled, if necessary, to search the jurisprudence of Strasbourg to find our English law of privacy. He said that arts 8 and 10 (neither of which has presumptive priority) "are the very content of the domestic tort that the English court now has to enforce".¹⁵

Unfortunately, the *Bloomberg* decision leaves, for the moment, a number of unanswered questions with which practitioners are going to have to grapple while trying to reconcile ill-fitting lines of authority.

The factual background is relatively straightforward. ZXC (the claimant and respondent) worked for a company (referred to as "X Ltd" in the judgment) which operated in various countries and he became chief executive of one of its regional divisions. In 2016 Bloomberg published an article relating to the activities of the company in a particular country for which his division was responsible.

12 *Campbell v MGN Ltd*, above n 3, at [21], [85], [134] and [165].

13 See for example *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595, [2006] QB 125 at [83]; *McKennitt v Ash*, above n 7, at [23]; and *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) at [23].

14 *McKennitt v Ash*, above n 7, at [41].

15 At [11].

Those activities had become the subject of a criminal investigation by a law enforcement body in the United Kingdom (the "UKLEB") and the information in that article was almost entirely drawn from a confidential Letter of Request sent to that foreign state. The claimant alleged that he had a reasonable expectation of privacy in respect of information published in the article, which included details of the UKLEB investigation into him and his affairs, its assessment of the evidence, its belief that he had committed certain criminal offences and its explanation of how the evidence it was seeking would assist the investigation into his suspected offending. He was awarded damages of £25,000 and injunctive relief before Nicklin J.¹⁶ The offending article was to be removed from the Internet.

In the Supreme Court it was made clear that, in cases of this kind, the enquiry the judge was required to carry out was fact specific, and the decision had to be made in the light of all the circumstances. The confidential nature of the information had not been determinative, but it had played a significant part in the Court's deliberations both at Stage 1 and Stage 2. That approach was justified and involved no error of law. Information in this category would be likely generally to lead to the conclusion that there was a reasonable expectation of privacy. There was a legitimate starting point to that effect (although not a presumption), and it applied in this instance. Confidentiality was not to be confused with privacy, but it was recognised that it would often be a relevant factor in deciding whether there was, on the particular facts, a reasonable expectation.

Professor Nicole Moreham has pointed out that, in the Judge's consideration of the reasons for confidentiality attaching to the contents of the Letter, he especially emphasised the need to protect the integrity of the UKLEB investigation:¹⁷ she suggests that the link between that need and the privacy of the claimant was not clearly established.¹⁸ A similar emphasis was given later in the Supreme Court judgment, at [13]–[17], where the confidential nature of a Letter of Request was described in some detail. Indeed, it was quoted in extenso, including from a passage headed "Confidentiality":¹⁹

The reason for requesting confidentiality is that it is feared that, if the above suspect or an associated party became aware of the existence of this request or of action taken in response to it, actions may be taken to frustrate our investigation by interference with documents or witnesses.

This may be thought rather to underline Professor Moreham's point.

The explanation offered in the judgment for the supposed link is as follows: "As a suspect in the investigation, the claimant ... had a particular interest in avoiding prejudice to, and maintaining the

¹⁶ *ZXC v Bloomberg LP* [2019] EWHC 970 (QB), [2019] EMLR 20.

¹⁷ Nicole Moreham "Privacy, reputation and alleged wrongdoing: Why police investigations should not be regarded as private" (2019) 11 JML 142 at 144 and 147.

¹⁸ At 146.

¹⁹ See *ZXC v Bloomberg LP*, above n 2, at [17].

fairness and integrity of, that investigation."²⁰ That may be so, but it is by no means obvious how this translates into an enforceable expectation of privacy on the part of ZXC. The concern is rather directed towards the public interest in protecting police investigations and the administration of justice.

Letters of Request are always recognised to be confidential documents. In this one, it was explained that no one had yet been charged but that the investigation concerned possible offences of corruption, bribery, offences under the Proceeds of Crime Act 2002 (UK) and the Fraud Act 2006 (UK), as well as conspiracy to commit certain offences. Considerable detail was given as to the investigations and it was stated that the UKLEB was investigating whether the claimant was part of a conspiracy to defraud X Ltd. These were the circumstances in which ZXC brought his privacy claim.

It is obvious that such revelations are likely to do immense harm to the standing and reputations of any persons who are made the subject of such publicity. It was hardly surprising, therefore, that a judge should have referred in one case to:²¹

... a growing recognition that as a matter of public policy the identity of those arrested or suspected of a crime should not be released to the public save in exceptional and clearly defined circumstances.

It would be entirely appropriate if the legislature chose to offer protection in relation to such information prior to charge: what is more, this could plainly be said (to those troubled by such matters) to carry with it a democratic mandate. So far, however, the objective has been achieved only via the judicial route, through the ready availability of art 8, and *Bloomberg* represents the culmination of that process.

That may (or may not) be a satisfactory state of affairs, "as a matter of public policy", but it has not been brought about by means of carefully tailored statutory drafting: nor are the circumstances by any means "clearly defined" – as arguably befits such an important restriction of free communication between the media and general public. It does mean that the embarrassing facts or allegations which a claimant wishes to conceal have to be fitted into the notion of privacy, as currently interpreted. This will not always be entirely straightforward. It is not easy to see, for example, how the content of a Letter of Request could be likened to the "private property" of a suspect in accordance with the analysis of Buxton LJ in *McKennitt v Ash*.²²

²⁰ At [154].

²¹ *PNM v Times Newspapers Ltd* [2014] EWCA Civ 1132, [2015] 1 Cr App Rep 1 at [37] per Sharp LJ. Examples of the "growing recognition" are to be found in Brian Leveson *An Inquiry into the Culture, Practices and Ethics of the Press* (November 2012); and Richard Henriques *Independent Review of the Metropolitan Police Service's handling of non-recent sexual offence investigations alleged against persons of public prominence* (October 2016) at [1.94]. See also College of Policing *Guidance on outcomes in police misconduct proceedings* (2017) at [3.2].

²² *McKennitt v Ash*, above n 7, at [53].

Earlier cases include *Crook v Chief Constable of Essex Police*, where the police had gone so far as to issue a press release stating that the claimant was "wanted" on suspicion of rape.²³ The judgment recorded that "[t]here is no dispute in relation to the claim under Article 8 that the information is such that there was a reasonable expectation of privacy."²⁴ Moreover, it was held that the disclosure had been unnecessary and that it was not proportionate to any legitimate aim. There was also the decision of Nicol J in *ERY v Associated Newspapers Ltd*, where it had been conceded that the fact that a claimant had been interviewed under caution (over his suspected involvement in a financial crime) engaged his rights under art 8.²⁵ It was again conceded, in relation to Stage 2, that in the circumstances the defendant's art 10 right was not capable of prevailing.

The most notorious example was that of *Richard*,²⁶ cited above, which was followed by Warby J in *Khan v Bar Standards Board*, where he stated that "the starting point in such a case is that the person under criminal investigation has a reasonable expectation of privacy".²⁷ Warby J returned to the theme in *Sicri v Associated Newspapers Ltd* and referred to "a general rule in favour of pre-charge anonymity for suspects".²⁸ He derived this "rule" from a number of cases – not least from the Court of Appeal's judgment in *Bloomberg*.²⁹ He then proceeded to another important conclusion:³⁰

The notion that information about official suspicion engages an individual's article 8 rights, *because of its reputational impact*, appears to me to have been firmly established at the highest level³¹ over a decade ago.

Despite such endorsement, however, this "notion" is somewhat counter-intuitive, to say the least. As Professor Moreham has observed, "something will not belong to the private realm of your life *because* it harms your reputation".³²

One might have raised an eyebrow or two, in the past, at the suggestion that official suspicion as to the committing of a serious criminal offence fell within the notion of a right to privacy on the part

23 *Crook v Chief Constable of Essex Police* [2015] EWHC 988 (QB).

24 At [45].

25 *ERY v Associated Newspapers Ltd* [2016] EWHC 2760 (QB), [2017] EMLR 9 at [11], [52] and [65].

26 *Richard v British Broadcasting Corporation*, above n 10.

27 *Khan v Bar Standards Board* [2018] EWHC 2184 (Admin) at [47].

28 *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB), [2021] 4 WLR 9 at [76] and [85].

29 *ZXC v Bloomberg LP* [2020] EWCA Civ 611, [2021] QB 28.

30 *Sicri v Associated Newspapers Ltd*, above n 28, at [76] (emphasis added).

31 See *Re British Broadcasting Corporation* [2009] UKHL 34, [2010] 1 AC 145 at [25]; and *Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697 at [32]–[36].

32 Moreham, above n 17, at 152 (emphasis added).

of the suspect. The subject matter is in itself hardly private or personal: it is not like an issue of health, or of personal relationships. It concerns an individual's role as a citizen – his relationship with the state.

Further, the suspicion that he has committed such an offence is not personal to him. We are concerned with suspicion on the part of *others* – with the suspicion of state officials and with *their* conclusions (formulated in their official capacity). It seems odd to speak of a suspect's right of privacy in such matters, or of a right to keep to himself the thoughts of state officials. They are not within his "private realm". Their business concerns the interface of the individual citizen with the state.

The "founding fathers", or post-war draftsmen, would surely be surprised at the notion of art 8 conferring a right to keep one's suspect activities private – even on a temporary basis. Modern public opinion may well think it right to forbid publicity with a view to preventing unfairness or prejudice, or reputational harm prior to charging, just as it may be fair to prevent the court from knowing about previous convictions up to a certain point. But that objective could be provided for by rules or laws specifically designed for the purpose (eg along the lines of those contained in the College of Policing Guidelines). There was no need to classify UKLEB suspicions as falling within the notion of privacy. Moreover, insofar as the purpose is to protect *reputation*, it seems odd to resort to the common law while ignoring the rules of libel. After all, what would tend to damage a suspect's reputation is the fact that it is defamatory – not that it is (supposedly) private.

Yet all that is water under the bridge. There seems to be no doubt that English law now *does* rely on the apparatus of art 8 for this purpose. What accounts for this reliance would appear to be the relatively recent extension of that umbrella to cover reputation – hitherto perceived as the business of the law of libel. Sir Mark Warby has hit the nail on the head when he referred in *Sicri* to the "*reputational impact*" of official suspicion.³³

There is certainly domestic authority that the art 8 umbrella has been stretched in the way he describes.³⁴ Just as surely, Bloomberg were misguided in their submission that:³⁵

... information is protected because – irrespective of the effect on the claimant's reputation – information of that nature belongs to a part of the claimant's life which is of no-one else's concern.

Of course it is of concern to others – not least those charged with the responsibility of investigating possible crimes. So it can only be the wider, reputational, aspect of art 8 which led the *Bloomberg* Judges to their conclusion.

33 *Sicri v Associated Newspapers Ltd*, above n 28, at [76] (emphasis added).

34 *Khuja v Times Newspapers Ltd* [2017] UKSC 49, [2019] AC 161 at [21] per Lord Sumption.

35 See *ZXC v Bloomberg LP*, above n 2, at [114].

Reference was made, both at first instance and at the Court of Appeal stage, to the so-called "Murray factors";³⁶ that is to say, the non-exhaustive list set out by the Master of the Rolls in *Murray v Express Newspapers plc* of matters which can usefully be taken into account in determining, at Stage 1, whether or not a claimant has a reasonable expectation of privacy.³⁷ The sixth factor on the list refers to the effect of publication on the person concerned. It was held that there had indeed been a significant impact on ZXC, both by way of loss of autonomy and damage to reputation.

What is more, there seems to be clear support in Strasbourg jurisprudence for the inclusion of reputation under art 8. It was said, for example, in *Pfeifer v Austria* that:³⁸

... a person's reputation, even if that person was criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her "private life".

Dare one say non sequitur? Reputation is the antithesis of "private life": it represents a person's *public* persona.

Similar observations were made, however, in *Axel Springer AG v Germany* to the effect that "the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life".³⁹ (The attack on reputation has to attain a certain level of seriousness before art 8 comes into play, but that is also true in England by reason (at least) of the Defamation Act 2013 (UK).)

The Supreme Court has now confirmed in *Bloomberg* that "information may be characterised as private because it is reputationally damaging".⁴⁰ It was stated that:⁴¹

... reputational damage attaining a certain level of seriousness and causing prejudice to personal enjoyment of the right to respect for private life, can also be taken into account in determining whether information is objectively subject to a reasonable expectation of privacy in the tort of misuse of private information.

36 See *ZXC v Bloomberg LP*, above n 29, at [69]; and *ZXC v Bloomberg LP*, above n 16.

37 *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481 at [36].

38 *Pfeifer v Austria* (2007) 48 EHRR 175 (ECHR) at [35]. See also *Denisov v Ukraine* Grand Chamber, ECHR 76639/11, 25 September 2018 at [97] and [100]; and *Radio France v France* (2005) 40 EHRR 29 (ECHR).

39 *Axel Springer AG v Germany* (2012) 55 EHRR 6 (Grand Chamber, ECHR) at [83].

40 *ZXC v Bloomberg LP*, above n 2, at [125].

41 At [125].

Nevertheless, it was acknowledged that, although art 8 does encompass a "reputational" dimension, this has been primarily protected in the United Kingdom by the tort of defamation.⁴²

Whether it was right, in principle, to stretch the scope of art 8 in this way is another matter. Reputation is concerned with the outward persona – that which is presented to the world at large. The fact that an allegation affects a person's reputation, whether adversely or otherwise, would hardly give rise of itself to an expectation of privacy. Otherwise, every defamatory allegation would create such an expectation and, correspondingly, a potential claim for MOPI (perhaps alongside a libel claim). In privacy claims, thus far, any protection for a claimant's reputation has been merely incidental; for example, because the suppression of allegations which happen to be defamatory has prevented people from knowing of a particular stain on his character. As Professor Moreham has argued, this is hardly in itself a *reason* for affording a remedy in privacy.⁴³

One may regret that the privacy tentacles have spread so widely, but the connection between reputation and art 8 is well established now, as a matter of English law. It often now lies at the heart of the court's reasoning when concluding, at Stage 1 in a privacy case like *Bloomberg*, that there is indeed "a reasonable expectation of privacy". One should, on the other hand, recognise that this approach introduces problems as well as apparent solutions, especially so far as remedies are concerned.

The central conundrum thus appears to be this. If the damage sought to be avoided is in the nature of reputational harm, why is the focus on breach of privacy rather than libel?

The answer appears to be that a defamation claim provides remedies in respect of allegations which are false (and, of course, defamatory), whereas proceedings based on MOPI are not necessarily concerned with truth or falsity but only with the issue of privacy.

It is time we returned to Ms Chase. The fact that a person is suspected by the law enforcement authorities, or is being investigated by them, would appear to convey a defamatory meaning at *Chase* Level Two or Three. If it was published, therefore, this would give rise to the possibility of a claim in defamation, either alone or alongside a claim in privacy. Yet a defendant would normally have the opportunity, if sued in such circumstances, of defending the claim by reliance upon a plea of truth. For a *Chase* Level Two meaning, he will naturally need to go further than merely pleading that the UKLEB has suspicions of the claimant's guilt: he will have to plead facts upon which (objectively judged) it is reasonable to form those suspicions.⁴⁴ (There may be some difficulty for a defendant in

42 At [125].

43 Moreham, above n 17.

44 *King v Telegraph Group Ltd* [2003] EWHC 1312 (QB) at [32]; and *King v Telegraph Group Ltd* [2004] EWCA Civ 613 at [22].

a case where the "reasonable grounds" consist, not of the claimant's own conduct, but rather of "strong circumstantial evidence" for which he is not necessarily responsible.)⁴⁵

Each case, of course, will turn upon its own facts, but it is likely that in a significant number of pre-charge cases a defendant would be able to plead a *Chase* Level Two defence of truth. If faced with an application for an interim injunction in a libel action, he could surely rely also on the old *Bonnard v Perryman* principle⁴⁶ and resist on the basis that he intends to prove "reasonable grounds to suspect" at the material time.

If the claim was based on privacy grounds, might he not also pray in aid the ancient equitable principle that there is "no confidence in iniquity"? (Nowadays, of course, usually subsumed into a more general discussion of where the public interest may lie.) In this context, it may be relevant to have in mind also the approach of Sir Anthony Clarke MR in *Lord Browne of Madingley v Associated Newspapers Ltd*, where it was recognised that it would often be inappropriate to grant an injunction, on privacy grounds, if the effect would be to hide suspected wrongdoing from those entitled to know about it.⁴⁷

All in all, however, one can see why reliance has come to be placed on privacy rather than libel. It seems to be less hedged about by established rules aimed at the protection of free speech.

Lord Sumption observed in *Khuja v Times Newspapers Ltd* that:⁴⁸

The protection of reputation is the primary function of the law of defamation. But although the ambit of the right of privacy is wider, it provides an alternative means of protecting reputation which is available even when the matters published are true.

But these two causes of action have quite different origins and, more importantly, quite different rules – to take account of the separate considerations of public policy they are intended to serve. We have seen, for example, that one very significant distinction concerns the truth or falsity of the words in question. If a claim is brought in defamation, there will be available various potential defences and, in particular, that of truth. If the defamatory words are found to be true that claim will fail.

45 See for example *Miller v Associated Newspapers* [2012] EWHC 3721 (QB) at [14]–[15] per Sharp J; and *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [34].

46 *Bonnard v Perryman* [1891] 2 Ch 269 (CA). An injunction is likely to be refused also in cases where it is clear that the proposed publication would take place on an occasion of absolute or qualified privilege: see *Harakas v Baltic Mercantile and Shipping Exchange Ltd* [1982] 1 WLR 958 (CA).

47 *Lord Browne of Madingley v Associated Newspapers Ltd* [2007] EWCA Civ 295, [2008] QB 103 at [52]–[54]; and *Gartside v Outram* (1856) 26 LJ Ch 113 at 114. See also *BKM Ltd v British Broadcasting Corporation* [2009] EWHC 3151 (Ch) at [35]; and *ABC v Telegraph Media Group Ltd* [2018] EWCA Civ 2329, [2019] 2 All ER 684 at [34].

48 *Khuja v Times Newspapers Ltd*, above n 34, at [21].

One of the main purposes of a defamation claim will usually be to achieve vindication of the claimant's reputation – to establish before the world at large the falsity of the defamatory allegation(s). In the absence of a full apology, the successful outcome can only be demonstrated in the terms of a written judgment or, as used to be more common, by a monetary award from a jury. Even where there is a written judgment (nowadays the norm), courts recognise that to achieve vindication it is usually necessary to be able to point to a suitably large award of damages in proportion to the gravity of the libel. It is accepted that people interested in the outcome are likely to ask simply, "How much did he get?".⁴⁹

An award of damages at the conclusion of a libel action, whether from a judge or a jury, can reflect a number of other factors. It may include, for example, compensation for distress and anxiety as well as vindication of reputation. On the other hand, generally speaking, a claim in privacy will not depend upon the truth of the words. That may indeed be completely irrelevant. As already noted, the revelation of intimate details about (say) a claimant's state of health is actionable because of the intrusion itself: the accuracy or otherwise is immaterial with regard to the wrong done. Vindication does not appear to be an issue.

Yet now it seems to be accepted in certain quarters that damages in a privacy claim may include compensation for injury to reputation.⁵⁰ That will only arise, presumably, if the relevant words are defamatory. That was the position, for example, in *Mosley v News Group Newspapers Ltd*.⁵¹ The claimant sued because there had been an intrusion into one of his sex parties by a woman with a camera concealed about her person and she then gave an account in the *News of the World*, illustrated by photographs, of what had taken place. The accuracy of the allegations about the party was, for the most part, accepted. (Yet they were arguably defamatory in themselves.) But an additional charge, to the effect that he had been mocking the victims of the holocaust, was vigorously denied, and ultimately found to be false. Because there was no claim for libel, the Judge did not include in the award anything by way of compensating injury to reputation, or that was intended to achieve vindication. As it happened, he had to make a finding in relation to the allegation about mocking the Jews – because it was highly material to the public interest pleaded by the defendants in the context of the Stage 2 privacy enquiry. Should the Judge have awarded damages for injury to reputation and, if so, should he have sought to vindicate as well as compensate? It was certainly not suggested at the time.

49 *Cairns v Modi* [2012] EWCA Civ 1382, [2013] 1 WLR 1015.

50 See for example *Hannon v News Group Newspapers Ltd* [2014] EWHC 1580 (Ch) at [25]–[79]; *Richard v British Broadcasting Corporation*, above n 10, at [346]; *Sicri v Associated Newspapers Ltd*, above n 28, at [139]; and *Khuja v Times Newspapers Ltd*, above n 34, at [21].

51 *Mosley v News Group Newspapers Ltd*, above n 13.

One difficulty is that vindication has always in the past been consigned to the law of libel to determine – and Mosley's was not a libel claim. Warby J has described libel as a "mature tort";⁵² that is to say, having its own tried and tested principles and rules of practice. One of those established principles was to the effect that a defendant would not have had to compensate a claimant for a false allegation of wrongdoing without having had the opportunity to plead and prove the truth of the charge he has made. He would thus be entitled to take advantage, if he could, of the defence of truth (then known as "justification"). In *Mosley*, the Judge did make a finding that the defamatory words about the holocaust were false, but in a quite different context (ie whether or not there was a public interest in publishing the holocaust allegations). He was not determining a defence of "truth".

It would seem to be important to avoid clashes of public policy when resolving issues of this kind. For example, a libel litigant should not be vindicated, or appear to have been vindicated, in respect of serious defamatory allegations which are true. That is public policy in operation in the law of defamation. In a privacy case, if a defendant has wrongly published defamatory and private information, should he have to compensate reputational damage even if the words are true? I cannot believe so. It would offend against the public policy already identified in the libel context. The hypothetical claimant would have had no right to the reputation he was hitherto enjoying. He would have had no right to be compensated, therefore, when it was lost. If, in a privacy case, a claimant is entitled to compensation for reputational harm, in respect of allegations which are not only private but also defamatory, there is a danger that the public will be misled – by the court. They may infer that he has been vindicated when he has not.

Mr Mosley had not sued in libel and chose to rely solely on the privacy claim. Accordingly, the Judge, rightly or wrongly, sought to confine the damages award to the claimant's distress caused by the intrusion and left out of account injury to reputation and any need for vindication. He did so because, as he thought, it would not be right to compensate the claimant for reputational damage without having given the defendants an opportunity to plead one of the traditional defences relevant to reputation. More generally, if a claimant wants people to believe that a publication was not only intrusive but also false, why should he be excused from the risks and disciplines of a claim for libel?

Yet later judicial observations would suggest that reputational damage *may* be taken into account in a privacy claim, as well as in defamation proceedings. If that is so, interesting questions arise as to the relationship and the overlap between the two. Certainly, Mr Mosley would have received far higher damages if the award was to include vindication in respect of the holocaust charge. Is truth irrelevant in a privacy claim? Or can it be pleaded (and proved) if the claimant is seeking damages for reputational harm? If truth is irrelevant in a privacy claim, does that mean that damages for reputational harm can be recovered even if the allegation is true (as Lord Sumption appeared to

52 *Sicri v Associated Newspapers Ltd*, above n 28, at [156].

suggest in *Khuja*)? Would it be possible to by-pass other traditional safeguards of free speech by confining a claim to MOPI?

These problems were addressed by Warby J in *Sicri*.⁵³ Up to that point, there had not been a case in which a judge had held that an individual could recover compensation in a MOPI claim in respect of reputational harm caused by defamatory allegations which were true. As he said, such an outcome would have been prevented by the common law "for centuries"; moreover, this principle had been effectively reaffirmed by the legislature in s 2 of the Defamation Act 2013. (Indeed, its attached explanatory notes (at [14]) make express reference to *Chase v News Group Newspapers Ltd* and its confirmation that the law only requires a defendant to prove the "essential" or "substantial" truth of the defamatory "sting".)

He expressed the view that reputational damages could not, and should not, be recoverable in a privacy claim. He suggests that, where such damages are sought, the parties should be subjected to the traditional disciplines of libel.⁵⁴ It is interesting to note that Nicklin J also appeared to accept this principle in *Bloomberg* at first instance.⁵⁵ Thus, even though a claim may be pleaded in privacy, the court should be able to take steps to ensure that the defendant is not deprived of the opportunity of relying upon traditional defamation principles in the context of damages, including in particular that vindication should not be available in respect of defamatory allegations that are true.

It is quite possible that the police or some other UKLEB may decide, in any given case, not to proceed and then to terminate their enquiries without charging the suspect. If some time later the fact of their earlier suspicions about an individual leaks out, there could theoretically be a claim for breach of privacy based on *Bloomberg*. If the claimant sought to include a claim for reputational damage, a defendant might wish to argue that, at one time, enquiries were indeed on foot, and that there had been reasonable grounds to suspect the claimant. That would entitle him surely to raise a defence in libel, but probably not in a purely privacy claim. If that is correct, it is hard to see how the privacy route could be characterised simply as "an alternative means of protecting reputation".

It seems that the law of privacy would now approach circumstances of that kind in the light of a principle which has been explained in *Denisov v Ukraine*⁵⁶ and by the Supreme Court in *Bloomberg*.⁵⁷ It is broadly consistent with our long-recognised public policy, albeit expressed in different language.

53 At [151]–[154]. See also *Aven v Orbis Business Intelligence Ltd* [2020] EWHC 1812 (QB).

54 See also *Lonrho v Fayed (No 5)* [1993] 1 WLR 1489 (CA); *Woodward v Hutchins* [1977] 1 WLR 760 (CA) at 764–765; *Service Corporation International plc v Channel Four Television Corporation* [1999] EMLR 83 (Ch) at 89–91; and *McKennitt v Ash*, above n 7, at [79].

55 *ZXC v Bloomberg LP*, above n 16, at [151]–[152].

56 *Denisov v Ukraine*, above n 38, at [98].

57 *ZXC v Bloomberg LP*, above n 2, at [119].

That is to say, one cannot rely upon art 8 "to complain of a loss of reputation which is the foreseeable consequence of one's own actions".⁵⁸ That applies when such "actions" amount to a criminal offence but also more widely, namely to "other misconduct entailing a measure of legal responsibility with foreseeable negative effects on 'private life'."⁵⁹

Sometimes, a UKLEB investigation will lead to a prosecution and a trial takes place. By then, *whatever the outcome*, the reasonable expectation of privacy will have expired anyway (from the date of charging). It would be somewhat unreal in those circumstances to award compensatory damages in respect of any limited period, prior to charging, during which the relevant information was (ex hypothesi wrongly) in circulation.

Take it one step further. If a claimant is actually *convicted* of the relevant offence, having previously claimed MOPI damages for allegations published prior to charging, what then? There would be an even stronger argument that he should not receive reputational damages at all, whether in respect of distress or vindication. (In a libel action a conviction would be treated as conclusive evidence of guilt by reason of s 13 of the Civil Evidence Act 1968 (UK). While that would not apply in a privacy case, I suggest that it would make little difference in practice.) Most people would, I believe, find it odd that a claimant who had committed an offence should be compensated because people had found out (albeit prematurely) that he had come under suspicion!

Suppose the holocaust allegations in *Mosley* had been true. The claimant could hardly recover damages for the distress brought about by that very serious accusation. It may be true that he would have suffered more damage and distress because the defendants had ex hypothesi let the cat out of the bag: we may assume also that his reputation had hitherto been unsullied by that information. Had it not been for their MOPI, he could have continued to enjoy the same peace of mind as before. But it was a peace of mind and an unsullied reputation to which he was not entitled: surely the same public policy that operates in respect of libel would and should operate in a privacy claim. It is less clear how that outcome can be achieved. Whether Mr Mosley's "actions" at a private sex party would cause negative effects on his "private life", and/or whether such effects could be classified as "foreseeable", would no doubt be matters for argument.

It is regrettable that the relationship between the three causes of action, libel, breach of confidence and MOPI, has not been analysed more fully at an appellate level. It may be that the solution is for judges only to permit the recovery of damages for reputational harm if a claimant has sued, at least in that respect, for defamation – where the traditional free speech protections are readily available. I suspect, however, that this would not be compatible with achieving the desired objective and it would present too many hurdles for the "suspect" to overcome. If a claim is framed in libel, of course, there would arise the possibility of pleading the new "truth" defence but also, more significantly, the

58 *Denisov v Ukraine*, above n 38, at [98].

59 At [98].

claimant would be met at the initial injunction stage by *Bonnard v Perryman*. If it is intended to bypass such hurdles, as I apprehend, then the exceptions would best be defined in statutory wording drafted to cater for this specific set of circumstances.

Warby J made the point in *Sicri* that, if a claimant were trying to avoid the disciplines of libel by suing only for breach of privacy, hoping thereby to preclude a defence of truth or some other traditional protection, this might well be regarded as an abuse of process.⁶⁰ He cited the words of Buxton LJ in *McKennitt v Ash*:⁶¹

If it could be shown that a claim in breach of confidence was brought where the nub of the case was a complaint of the falsity of the allegations, and that that was done in order to avoid the rules of the tort of defamation, then objections could be raised in terms of abuse of process.

Clearly, one must choose the cause(s) of action with some care. But those who seek to protect their reputations when they are the subject of police investigations, or the object of any UKLEB enquiries, are not necessarily wanting to correct false statements of fact; often their primary concern will be with the publication of true (but supposedly "private") allegations (eg to the effect that there are reasonable grounds to suspect them of wrongdoing). That clearly cannot be characterised as abuse of the process.

It will be no answer to a privacy claim, therefore, for a defendant to say merely that his allegations are true. It may well be reasonable, however, in some circumstances for issue to be joined on the legitimate scope of the damages enquiry. A defendant should not have to compensate in respect of a reputation to which the claimant is not justly entitled, or to pay a sum which has the effect of vindicating that claimant in respect of a defamatory allegation which happens to be true (or perhaps "a foreseeable consequence of [his] own actions"). It would thus be appropriate to provide for such issues to be resolved in the light of fully pleaded cases. A procedure needs to be devised to lay the ground for such a contest. Either the claimant who seeks reputational compensation should plead his case fully in his MOPI claim, giving the defendant an opportunity to respond, or he should be precluded from claiming or recovering such damages except by way of defamation proceedings. What is surely not acceptable is to permit a privacy claim which slips in, almost as an afterthought, a claim for reputational damages without affording the defendant, at least to that extent, access to the traditional free speech protections available in the law of libel.

If society, for understandable reasons, wishes to introduce a rule that suspected persons, or those under investigation, should be protected by anonymity until charged, so be it. But the novelty of the circumstances requires to be carefully addressed and, I would suggest, by carefully drafted legislative provisions. That would present a more reliable vehicle for identifying what Dame Victoria Sharp referred to, in *PNM v Times Newspapers Ltd*, as the "clearly defined circumstances" when protection

⁶⁰ *Sicri v Associated Newspapers Ltd*, above n 28, at [166] per Warby J.

⁶¹ *McKennitt v Ash*, above n 7, at [79].

would or would not apply.⁶² It would also be preferable to bending the common law or undermining long-established rules of public policy. But, if the Government is going to change the law on privacy, as contemplated, we shall have to make a fresh start anyway: we might as well get it right next time.

CELEBRATING A REMARKABLE CAREER: ATH SMITH

In 1992 I was seeking out a potential co-author to work on the second edition of a book on contempt of court, which was about to be admitted to the Sweet & Maxwell Common Law Library. I was introduced by Professor John Spencer to Tony Smith, then a Cambridge colleague of his and a well-known specialist in constitutional and criminal law. He proved to be ideal for the task – not least because he turned out, conveniently, to be an expert in media law as well.

We worked together on the project for several years and devised a rather novel – not to say literal – method of co-authorship. This involved sitting beside one another for many hours and composing the text as we went along. Anyway, we soon became firm friends and my wife and I enjoyed many trips with Tony in various parts of the world. In particular, he drove us for several thousand miles around New Zealand in his very comfortable car. We explored much of the South Island in 2008 and the North Island in 2013.

Meanwhile, the book continued on its way. By the time of the fourth edition in 2011 and the fifth edition in 2017, it had become necessary to recruit some younger specialist lawyers to whom we are very grateful for taking on much of the necessary updating. So there has been rather less of our eccentric co-authorship methods. Nevertheless, I remain very grateful to Professor Spencer for his original suggestion. It has been a great pleasure and privilege to have known and worked alongside Tony for so many years. He well deserves this tribute from his many friends and colleagues and we wish him well for his retirement and future activities.

⁶² *PNM v Times Newspapers Ltd*, above n 21, at [37].