

**“How private is private?”  
(8 October 2011)**

I have been asked to say something about the law of privacy. I can't imagine why. After all, it seems a bit old hat these days. The principles are now clear and well established.

The background too is well known: how 21 years ago the Court of Appeal in *Kaye v Robertson* [1990] FSR 62 said that there was no law of privacy. The actor Gordon Kaye was therefore left without a remedy. In those days, he was very much a household name because of the television series *'Allo 'Allo*. He suffered a nasty head injury in January 1990 in the course of a freak storm in London. While he was in hospital recovering from brain surgery, journalists and photographers got into his hospital room, disguised as doctors and nurses, and took photographs. They even purported to conduct an interview with him, although he barely knew what was going on.

Most people would probably agree today with the remarks of Bingham LJ (as he then was) that, if ever there was a time when one was entitled to be left alone, and to have one's privacy respected, it must surely be when one is recovering in hospital in a state of semi-consciousness. I do not recall anyone even arguing, at the time, that because he was a television celebrity he “had it coming to him” or that the intrusion was justified as a matter of “public interest”. But nothing could be done at that stage and the members of the Court of Appeal actually suggested that it might be appropriate to legislate.

There was no taste, however, among politicians then for imposing restrictions on the media. How things have changed. A few months ago, the wider public became exercised at revelations about phone hacking at the *News of the World*. That is said largely to derive from individual cases of phone hacking involving so-called “ordinary people” and, in particular, grieving families. This has been taken up with great enthusiasm by politicians, at least for the time being, because the public is perceived to be with them. It is a major shift in the public mood that has resulted in the media, or rather a section of the media, being on the back foot. That position may easily be reversed in a short space of time and should certainly not be assumed to be permanent. Phone hacking is merely one aspect of intrusion into personal privacy and a different set of facts, involving a different set of “victims”, could just as easily cause public sentiment to swing in the opposite direction.

Only a few weeks earlier, the mood was quite the other way. Politicians, the media and a large part of their readership were keen to do away with any protection for privacy and to treat “kiss and tell” revelations as fair game – largely because the “victims” were, or were portrayed in the media as, celebrities. The argument apparently was that one law should apply to the general public and another to “celebrities”. It would, of course, be quite contrary to our tradition that citizens should be divided up into groups and given different legal rights or remedies. Unlike the United States, we do not recognise a separate class of “public figures”.

As everyone here knows perfectly well, and however much it is denied by journalists or politicians, there is in this jurisdiction now a law protecting personal privacy. Whether that is desirable or undesirable is an issue on which opinions no doubt differ. Yet Gordon Kaye nowadays would most assuredly have a remedy. Because neither he nor his friends knew about the invasion of his bedroom before it happened, that remedy would be confined to damages after the event. But, had those representing his interests found out about the plan to invade in advance, they would almost certainly nowadays have been able to obtain an

injunction to prevent it happening – perhaps even one of those extremely rare birds now known as a “superinjunction”.

That is nothing to do with a change in political will or a pledge in any party manifesto. Yet, although the law was changed largely as a result of values deriving from Strasbourg, it was certainly done with the sanction of Parliament.

Ministers in the 1990s dealt with the issue, from time to time, by simply saying that it was up to the judges to develop the law – not a suggestion we hear much from politicians today. This was echoed in the Goodman lecture *Mind your own Business* given by Lord Hoffmann on 22 May 1996 (which I remember attending). He made the bold suggestion that “if the English judges were to decide that the lack of a right to privacy represented a gap in the law, there [were] ample materials to hand to enable such a right to be constituted”. But in fact the existing law was such that the courts were simply not in a position to introduce an extensive law of privacy, such as we now have, without express legislation.

No development was possible because a claim in confidence, as then understood, could only be founded either in contract (perhaps most frequently a contract of employment) or in equity. That would be in circumstances where equity had recognised a duty of confidence binding on the conscience of the relevant defendant. Traditionally, any such remedy presupposed a relationship of some kind giving rise to that equitable duty. Gordon Kaye had no such relationship with any of his unwelcome intruders.

Things began to change at the end of the 1990s. It was by no means confined to this jurisdiction. We must not be parochial. We should not lose sight of the fact that it is not just the European Court that has been working its way towards the protection of private information. It is being carefully studied by governments in other democracies such as Australia and New Zealand. People in many western societies seem to be sensing that there is something inherent in the human condition, separate and apart from physical protection, financial wellbeing and property rights, that calls for legal recognition. It is not easy to define, although various attempts have been made over the years by reference to such concepts as autonomy, dignity, the freedom to express and develop one’s personality and to form relationships with other people. May be the simplest is that of Warren & Brandeis in their famous article *The Right to Privacy*, (1890) *Harvard Law Review*, 4(5), 193-220, at 195: “the right to be let alone”.

In 1996 came Article 17(1) of the International Covenant on Civil and Political Rights:

“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.”

You will note that neither the Covenant nor the Convention contains any provision to the effect that:

“No one shall be subjected to arbitrary interference with his privacy ... unless he happens to be a Premier League footballer or unless he has appeared on Strictly.”

You will notice a further point there. It may be similar in wording to Article 8 of the European Convention, but the Covenant expressly sets reputation alongside privacy as a legitimate interest to be protected, those being different aspects of “human autonomy and

dignity” – concepts which are relatively new entrants to the lexicon of the common lawyer, but now overtly recognised (for example, by Lord Hoffmann in *Campbell v MGN Ltd* [2004] 2 AC 457).

Although Article 8 of the European Convention, when originally formulated, did not directly associate reputation with privacy, it seems that over the last few years the clear direction of travel in Strasbourg has been to treat them both as coming under the protection of Article 8: see e.g. *Radio France v France* (2005) 40 EHRR 29 and *Pfeifer v Austria* (2009) 48 EHRR 8. So it would appear that both those international instruments are marching very much in step.

By contrast, it is now argued in this jurisdiction, quite regularly, that the common law has prized reputation too highly. Especially in the modern era of the Internet and social media, reputation should not be given such status; it is in any case impractical to do so. Everyone is entitled to their own opinion, to say what they like and, particularly, to do it under a cloak of anonymity. Truth on the Internet is often very much what you want to make of it. Reputation, it is argued, is as out of date a concept as “honour” (with its overtones of chivalry and damsels in distress). Although that is a common argument, not least among journalists (for reasons one can well understand), it is at least necessary to recognise that this is to move, more or less, in the opposite direction from that of the International Covenant and Strasbourg jurisprudence.

Yet the question is quite commonly asked now, “So what? Why should we care what these foreigners say? We should have our own laws and our own form of media regulation – or perhaps none at all”.

Yet others urge us to espouse the approach of the United States and adopt a First Amendment – whereby freedom of speech is accorded an automatic priority. But the circumstances in which we find ourselves are rather different.

Shortly after the promulgation of Article 17 of the International Covenant, the Council of Europe made its Declaration 1165 of 1998, including that:

“... 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. Those rights are neither absolute nor in any hierarchical order, since they are of equal value.”

In the same Resolution, it was made clear that individuals should be allowed to enforce Article 8 rights horizontally against other individuals or corporate entities.

So that is where things stood at the time that the Human Rights Act 1998 was enacted and came into effect, as everyone knows, on 2 October 2000. Public authorities thereafter, including the courts, have had to give effect to the values enshrined in the Convention and, in doing so, they must have regard to Strasbourg jurisprudence.

What I want to consider this morning is exactly what that entails for us and the means by which the courts have tried to give effect to Parliament’s intentions. Have the judges, and the lawyers appearing before them, been doing what the legislators required of them and, if so, by what means?

A key decision was that in the *Naomi Campbell* case [2004] 2 AC 457, which put two matters beyond any doubt: first, that to seek the court’s assistance in enforcing a right of privacy, you

do not need to prove any existing duty of confidentiality. Secondly, in accordance with Council Directive 1165, you can enforce your rights horizontally. As Lord Hoffmann put it in *Campbell* at [50], he could 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”.

You may recall phrases that were used quite a lot at that time, such as “new landscape” or “new methodology”. Others were content to say simply that the judges were developing the law in the traditional common law way, as they were brought up to do, and that it may not really be all that new after all. So who is right?

At least it is legitimate to explore the nature of those judicial activities, with the benefit of six or seven years experience, and to try and give some answers.

One can at least say with some confidence what the judges are *not* doing. They are not introducing a judge-made law of privacy “by the back door”. Whatever we have been doing, it has certainly been on the front doorstep and in the full glare of media publicity. When Mr Mosley exercised his Article 6 rights by seeking access to justice, it could hardly be described as a clandestine process. It could not have been subjected to longer or more intensive scrutiny. That was one of very few trials. There was to be a 3 year interval before the *Ferdinand* decision last week: [2011] EWHC 2454 (QB). Most of the cases that come before the courts have been prior to publication, rather than afterwards, and the remedy sought was an injunction. Even in that context, however, there are large numbers of judgments publicly available, at various levels, explaining the methodology in general terms and how it has been applied to the facts of the particular cases.

Nor has it been, in the words of one newspaper article, justice “behind closed doors”. The practice has been generally adopted in these privacy cases of setting out the reasoning by which the decision has been reached and as many of the facts as may be necessary to understand why the court has given or refused any particular remedy. Of course, the claimant and sometimes the respondent may be anonymised. That often fulfils the criterion of necessity because, otherwise, there would be nothing left to protect and no point in coming to court. One has to try and avoid, so far as possible, the court process itself intruding on the applicant’s privacy to the same, or to a greater, extent than the prospective publication sought to be enjoined.

As the Court of Appeal explained earlier this year, the demands of open justice will often positively *require* that parties be anonymised so as to enable the court’s reasoning processes to be properly understood and open to scrutiny: see *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42. It will generally be a more informative course to take for the public, overall, than simply to say that Mr Bloggs was given an injunction – “full stop”. It follows from this approach that sometimes the privacy or confidentiality attaching to the information will effectively only hang by the thread of anonymity. Once that is breached, much of the information can be deduced from the public judgment.

Given that the reasoning processes have been subjected to such exhaustive analysis, what conclusions can we now draw? How novel is the “new methodology”? We start with *Re S (A Child)* [2005] 1 AC 593, which followed on from and sought to put into effect the principles identified in *Campbell*. The court is required to decide first whether the facts engage the claimant’s Article 8 rights and whether he or she has “a reasonable expectation of privacy” in respect of the relevant information. If not, that is the end of the matter. If yes, then you apply “an intense scrutiny” to the facts of the case and apply what Sir Mark Potter has called the

“parallel analysis”: *A Local Authority v W* [2005] EWHC 1564 (Fam). In other words, you weigh up the claimant’s right of privacy against the respondent’s Article 10 right to publish and also, where appropriate, the public’s “right to know”. You carry out what is known as “the ultimate balancing exercise” to arrive at the final conclusion.

As the judge embarked on such an exercise, what are you actually doing?

- (1) You are not exercising a discretion.
- (2) You are making a judgment involving both comparison and evaluation.
- (3) You are not seeking to achieve, in all cases, a solution which can be characterised as “the right answer”. It is well recognised that other judges might quite legitimately come to a different conclusion on the same or similar facts.
- (4) When asked to grant an injunction, you are supposed to do all this on incomplete or partial evidence in order to predict the “likely” outcome at trial.

It follows from this methodology that the Court of Appeal will rarely interfere with the actual decision reached, once the balancing exercise has taken place, provided the correct questions have been asked – and even the judges are capable of asking those.

We are used to the idea that an appellate court will hold back from intervening and overturning an exercise of discretion, but this is different. It is not a matter of discretion at all.

For a time, it was thought that it was simply an example of the common law receiving a shot in the arm from Europe. Many law students are attracted into legal practice by the idea of an organic common law, which goes on developing in a creative and imaginative way as society develops and takes new turns. In recent years, however, those high hopes will have led to disappointment because the common law has appeared to be somewhat inactive in some departments – not to say sclerotic. Parliament has increasingly sought to develop the law by infinitely detailed statutory micromanagement. That is fine. That is democracy in action. But so often modern legal practice has appeared to involve ploughing through one piece of stultifying language after another. The methodology seemed to be “Read it, try to understand it, try to analyse it, try to reconcile it with earlier legislation. Then give up and get it amended”. Another factor in play has been the emphasis in recent years on alternative dispute resolution, mediation and arbitration. Less litigation fights to a conclusion and, correspondingly, in some areas of the law there has been less opportunity to resolve contested issues of law in the High Court or Court of Appeal, and so the common law tends to become less vibrant.

It looked at first as if the enactment of the Human Rights Act, in the context of privacy at least, was going to give the common law a much needed stimulant. We had no privacy law to speak of before and, therefore, the judges were going to have to develop one in accordance with Article 8 and Article 10 jurisprudence from Strasbourg – assisted, no doubt, by some of the equitable principles already established in relation to confidentiality. But, as the Court of Appeal made clear in *McKennitt v Ash* [2008] QB 73, “to find the rules of the English law of breach of confidence we now have to look to the jurisprudence of Articles 8 and 10”. That would appear to by-pass the common law altogether, and to have us mainlining into Strasbourg.

So let us consider how this process has worked in privacy, where you might suppose there was going to be greater scope for case by case development. How does it measure up to Professor Dworkin's analysis of the common law method? Naturally, I must tread with care. One should never be presumptuous when addressing Professor Dworkin's writings. Least of all should one presume to have understood them. But I believe he sees the common law judges as coming along generation by generation: they learn the story so far; they go on to write the next cliff-hanging episode; then they retire, leaving the dénouement to their successors. If that is a fair reflection of the common law method, it is not really what is happening here.

There is no such continuing saga on the law of privacy. There has rather been a series of individual sketches, and each time a balancing of competing interests unique to the particular facts of the case. This was re-emphasised by Nicol J last week in the *Ferdinand* case. As a judge making any of these decisions, one is not quite fitting the traditional role of a mere instrument for applying the law, rightly or wrongly, to an individual examination question. One is carrying out a comparison between two or more sets of competing interests, or conflicting rights, and making an evaluation of which should prevail in the particular circumstances. Because of the nature of the exercise, there is much less room for *stare decisis* or the following of precedent.

You may say, "Why is it so different from deciding whether a driver was reasonably careful as he turned the corner, or whether a cardiac surgeon fell below the standards of a reasonably competent practitioner, applying up to date knowledge and techniques?"

It is similar in some ways, but only up to a point. In a privacy context, you may come to the conclusion that the claimant's Article 8 rights are engaged and (if it is a different question) that he or she has a reasonable expectation of privacy. You may decide that the subject-matter goes right to the heart of a person's scope for individual development – and yet feel compelled to allow the intrusion to take place. That may be because of the claimant's job, or the way he or she has behaved in the past by making public pronouncements, or because there is an overriding public interest in revealing the information in particular circumstances. You may decide that some of it can be revealed and some not: an example of that is to be found in the Lord Browne case: *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103.

It is the need to weigh up, compare and evaluate competing rights that is different. There are a number of aspects to this. First, it is the need to compare two or even more sets of inconsistent interests: the claimant's privacy, the journalist's freedom of speech and/or the public's right to know. In a case involving a sexual or other intimate relationship, sometimes both participants are agreed they want privacy and sometimes they take diametrically opposed standpoints – the classic case is, of course, "kiss and tell". This interweaving of interests seems to be a new phenomenon. The patient lying on the operating table has a duty of care owed to him. That is a constant – whether or not the surgeon breaches it. No judge is going to deprive him of that duty of care because of his past behaviour (say) or because the surgeon's rights should in the particular circumstances prevail over his.

Another aspect of the exercise is that we are getting used to dealing with rights, as opposed to injuries, causes of action or a set of remedies. For lawyers of my generation, and indeed even several younger generations, rights were fairly unusual creatures. They have to be approached rather gingerly. We're not used to them. We have not quite yet, I think, recognised how novel they are and how we need to think in and speak a different language.

Take, for example, the concept of “cause of action” which I mentioned a moment ago. We are used to that concept (defined by Baron Parke as “... all those things necessary to give a right of action, whether they are to be done by the plaintiff or a third person”: *Hernaman v Smith* (1855) 10 Exch. 659, 666). It is something that can be defined by reference to a particular set of circumstances having arisen by a particular point in time. There are common law causes of action and statutory causes of action. It is certainly true that Parliament has not set out to identify something called a statutory cause of action. Any journalist or politician who opened the Human Rights Act would look in vain for a statutory cause of action in the traditional sense. What Parliament asked judges to do is something rather different and, for us in this jurisdiction, rather novel.

There were debates a few years ago, and indeed ongoing, as to whether a claim in privacy should be regarded as tortious or as founded in equity. In *Campbell*, at [14], Lord Nicholls referred to a “tort” consisting of the “misuse of private information”. At the Court of Appeal stage, Lord Phillips MR used the same terminology: [2003] QB 633 at [61]. On the other hand, a few years later, in *Douglas v Hello! Ltd (No 6)* [2006] QB 125 at [96], Lord Phillips concluded that it was equitable and, what is more, cited an earlier judgment of none other than Nicholls LJ for that proposition: see *Kitetechnology BV v Unicor GmbH* [1995] FSR 795 at [40]. *McGregor on Damages* (18<sup>th</sup> edn at 42-017) and *Clerk and Lindsell* (at 28-03) disagree about it. McGregor thinks it is tortious: Clerk and Lindsell think it is not. Does it matter? Well, sometimes it may. For example, the availability of exemplary damages had to be addressed in *Mosley v News Group Newspapers Ltd* [2008] EMLR 679. On that issue, the classification (tortious or not tortious) could have been very significant.

But, more fundamentally than that, is the debate simply sterile? Are we clinging to common law concepts that do not belong in the brave new world of enforcing rights? Is it right to talk of a cause of action at all? Taking Baron Parke’s notion of a cause of action, he characterised it as a set of circumstances giving rise, from a certain identifiable date, to a right of action. Presumably for purposes of limitation, there would have to be an identifiable date when an infringement of privacy has taken place (although I have not noticed the point arising so far). No doubt it would be said to have arisen in Mr Mosley’s case on the date when the *News of the World* was published in March 2008 – although it was not decided: limitation was one of the few points not taken.

But we need to remember that different judges can come up with different answers on the same set of facts, without one of them necessarily being wrong. Until the “ultimate balancing exercise” has been carried out, can one say whether the claimant is entitled to a remedy at all?

Because of the scope for individual judges to come to different conclusions, how realistic is it to say that, prior to that moment, anything has actually crystallised – such as a cause of action or a right of vindication?

No doubt we have to do so for the sake of convenience and consistency, but this process rather looks as if it is a “new methodology” and we are indeed living in a “new landscape”.

The Master of the Rolls characterised and encapsulated the exercise in one sentence in the course of a lecture on 28 April last year. What he said was this: “Parliament has enacted the general policy, and has left the application of the policy to particular cases in the hands of the judiciary.” That is, if I may say so, a very significant proposition.

It so happened that this lecture was delivered to the boys of Eton College – and so one has to grapple with whatever is the opposite of “pearls before swine”. I have had difficulty in sorting out exactly what that is.

It sounds at first hearing a fairly everyday summing up of the relationship between Parliament and the judges, but when unpacked it emerges as rather novel. Every day, of course, Parliament leaves particular tasks to the judiciary. There may be a discretion to exercise. There may be a general principle, or rules, to be applied to particular facts. There may be the adoption of particular statutory language for the judges to interpret. But it is recognising something rather new (is it not?) to say that the legislature has left the application of *policy* to the judges.

So what was the “policy” Parliament decided to adopt and left to the judges to implement? It can surely only be expressed in the most general of terms, namely that the courts are to give effect to such rights as are protected by the Convention and that, in doing so, they are to pay regard to Strasbourg jurisprudence. That is what the judges at least think they were told to do, and they have been getting on with it. Fundamental in the privacy context and, for that matter, also in the libel context and that of contempt of court, is the principle stated in the 1998 Directive by the Council of Europe to the effect that Article 10 and Article 8 are both to be regarded as of equal value. That would also be true of Article 6 and the right to a fair trial. That this has been adopted in our jurisdiction is manifest from at least two decisions of our highest court, namely *Campbell v MGN Ltd* and *Re S (A Child)*. Against this background it is futile to assert, as quite a number of people have done before parliamentary select committees, that judges are ignoring Parliament’s will in not, as a matter of generality, according priority to freedom of speech. That is *not* Parliament’s will. Parliament can only be construed as *requiring* courts to proceed from an assumption of parity and to weigh up the particular facts and decide which, in the light of that intense focus, should prevail in that case.

It has often been claimed, “It has all got out of hand. They are granting these injunctions and never take account of freedom of speech”. No examples are ever cited, but it is implicit in that argument that in the relevant cases, before an injunction has been granted, a submission has been made by the individual respondent, or by the media, that on those particular facts a judge ought to give priority to freedom of speech over the applicant’s expectation of privacy. That hardly ever happens: *Lord Browne of Madingley* is one rare example. Most frequently, the media, or an individual respondent (sometimes a blackmailer), will simply recognise that the information is of an inherently private nature (because it is almost always about sex) and that there is no countervailing public interest to justify overriding it. Correspondingly, they very rarely appeal. (That does not stop the journalist in question complaining next day that, once again, there has been a clampdown on free speech.) Why is it that such a small proportion of these applications is ever seriously contested? Largely, I suggest, because journalists and/or their lawyers realise that relatively little value is attached by the courts, either here or in Strasbourg, to what is often referred to as celebrity “tittle tattle” or “kiss and tell”. There is no encroachment upon the territory of truly investigative journalism. That, incidentally, was the finding of two journalists, Stephen Whittle and Glenda Cooper, two years ago in their report *Privacy, probity and public interest* published by the Reuters Institute for the Study of Journalism in Oxford.

It is interesting to see what Strasbourg had to say so recently in *Mosley v United Kingdom*, 10 May 2011, about “kiss and tell” at [114]:

“ ... there is a distinction to be drawn between facts – even if controversial – capable of contributing to a debate of general public interest in a democratic



society, and making tawdry allegations about an individual's private life ... In respect of the former, the pre-eminent role of the press in a democracy and its duty to act as a 'public watchdog' are important considerations in favour of a narrow construction of any limitations on freedom of expression. However, different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life ... Such reporting does not attract the robust protection of Article 10 afforded to the press. As a consequence, in such cases, freedom of expression requires a more narrow interpretation ... While confirming the Article 10 right of members of the public to have access to a wide range of publications covering a variety of fields, the court stresses that in assessing in the context of a particular publication whether there is a public interest which justifies an interference with the right to respect private life, the focus must be on whether the publication is in the interest of the public and not whether the public might be interested in reading it."

What did the Strasbourg judges say about prior restraint in this context? At [117], it was accepted " ... that prior restraints may be more readily justified in cases which demonstrate no pressing need for immediate publication and in which there is no obvious contribution to a debate of general public interest".

So let there be no mistake or confusion as to what the law is in England and Wales and has been for some years. It is the duty of the courts to balance competing Convention rights, including the right to privacy, with the right to impart and receive information. Equally, it is clear that when performing these balancing exercises the courts are required by Parliament to take account of Strasbourg jurisprudence in doing so and to afford remedies that are effective. That will often mean a readiness to grant injunctions in "kiss and tell" cases, because freedom of speech is accorded such a low priority in that context.

Parliament might wish to change the law at some stage, of course, but it is worth remembering that in February 2010 the Select Committee on Culture, Media and Sport came to the conclusion, following a lengthy investigation, that there was at that stage no need for legislation and that the courts should be allowed to carry on with a task already set them by the legislature. Nevertheless, some politicians still say that they would like to see change. It is a common theme that judges are, for reasons generally unspecified, getting the balance wrong (i.e. between Article 10 and Article 8). This is despite the tiny number of appeals to the Court of Appeal and the frequent refusals of permission to appeal to the House of Lords in the period up to 2009.

How much scope is there for useful or effective legislative change? It is necessary to bear in mind, in this context, what the European Court said in *Mosley* on the scope for differing applications of the law within individual member states; that is to say, on what is confusingly referred to as the "margin of appreciation". At [109], they said that:

"the nature of the activities involved affects the scope of the margin of appreciation. The court has previously noted that a serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity ... Thus, in cases concerning Article 8, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the state is correspondingly narrowed ... The same is

true where the activities at stake involve a most intimate aspect of private life  
...”

Let us then take stock. How successfully has Parliament’s plain intention as to the protection of Article 8 rights, as currently expressed in the Human Rights Act, operated since 2 October 2000?

This question is almost co-extensive with the issue of how effective the remedy by way of interim injunction has proved to be. I say that because if a claimant is confined to compensatory damages, after the event of publication, these are likely to be wholly ineffective in restoring the status quo.

At the successful conclusion of a libel action, whether by way of agreed settlement or the verdict of a jury, it may generally be said that a large award of damages (especially if coupled with a genuine apology) is capable of restoring the claimant’s reputation and achieving effective vindication. That is not so, however, in the case of a claim for infringement of privacy. Despite their increasing assimilation under Article 8, the two forms of action are very different in their objective. Reputation can be restored; privacy, once publicly intruded upon, cannot.

So far, there have been very few contested trials in privacy, but it is reasonably clear that monetary compensation is going to be a poor substitute for the prevention of intrusion in the first place. It cannot restore lost privacy or dignity. This point has been well made by Professor Gavin Phillipson in his article “Mr Mosley goes to Strasbourg”, published in October 2009 in the first issue of the *Journal of Media Law*. He emphasised the need for member states to provide remedies that are actually effective when Convention rights have been shown to be infringed: see e.g. *I v Finland*, 20511/03, 17 July 2008. Sometimes, that can only be achieved by preventing such a wrong occurring in the first place – rather than by affording token compensation afterwards. After the unheralded exposé by the *News of the World* in its newspaper and via its website, few commentators would argue that an adequate or appropriate remedy for Max Mosley would have been an apology. Thus, in order to comply with Parliament’s intention, the courts have to provide something that is of practical use.

That is why so much turns upon the effectiveness of injunctive remedies. Where the court recognises, in accordance with s.12 of the Human Rights Act, that a claimant is *likely* to succeed at trial in proving that an unjustifiable infringement of Article 8 is about to take place, what can it do to vindicate privacy? It can only grant a privacy injunction. So I turn to the question I posed in the title of this talk. Can the courts deliver? When you obtain a privacy injunction, how private actually is private? Sometimes, the answer is “not very”.

There would seem to be at least three factors to take account of. First, there is the need to address the requirements of open justice and to notify those, in so far as they can be identified, whose rights of free speech would be adversely affected. Courts have attempted for some years to strike that balance by a gradual process and a framework has now been formalised in the Master of the Rolls’ Practice Guidance on the subject – which became effective on 1 August of this year. Some of you may not have spotted this, since 1 August is a good day to bury new practice guidance. This is not the time to summarise its contents, but obviously (as has always been recognised as inevitable) the more widely notice is given, so too the less secure will be the information sought to be protected. Word spreads – not least among journalists.

That brings me to the second, closely related, factor. There is the Internet and the facilities now available for social network communications. The opportunities are there for anyone, journalist or otherwise, who hears of a privacy application, to spread the word and to hope to avoid being identified as undermining or disobeying the court's order. The next step would then be to go back to the court and say that the injunction has ceased any longer to be effective or to serve a useful purpose.

The courts will not necessarily accept that argument. Indeed, the very fact that the application is being made will usually demonstrate that the newspaper in question thinks that there is money yet to be made out of further revelations not yet widely known about. In those circumstances, obviously, the continuation of the injunction can still serve some purpose in preventing more intrusions into privacy. Such an order can also be effective, in a "kiss and tell" case, in preventing the primary respondent from spilling the beans about the detail of his or her former relationship. In such cases the judge will have a positive duty to maintain the injunction in being: see e.g. *CTB v News Group Newspapers Ltd (No 3)* [2011] EWHC 1326 (QB) and *(No 4)* [2011] EWHC 1334 (QB); *Goodwin v News Group Newspapers Ltd (No 3)* [2011] EWHC 1437 (QB). Nevertheless, modern and instantaneous electronic communications are a factor which can render an injunction less effective than might otherwise be the case.

Does this mean that a law of privacy is now inherently unenforceable? Should Parliament recognise this by statutory intervention? Or, perhaps, should judges give up the ghost and refuse injunctions – even where the statutory criteria of s.12(3) of the Human Rights Act are fulfilled? The latter course would surely not be appropriate. It is for judges to attempt to comply with Parliament's intentions, as expressed in statute, unless and until the legislature decides that a particular law has become undesirable or a statutory right unenforceable. It is not for judges to take that decision.

Meanwhile, it is worth recalling what the Attorney-General said in his Kalisher lecture on 12 October 2010, *Contempt of Court: why it still matters*. He made the significant, albeit perhaps optimistic, observation that he considered "... that the same editorial rigour which generally does and should continue to apply to the traditional printed press should also apply to online publication". He has made it clear on other occasions, in that context, that the web should not be regarded as a "wild west", where ordinary laws do not apply.

The third factor is of course coverage in Parliament. It is becoming fashionable to undermine injunctions on the floor of one or other of the two houses. One of the problems about an unwritten constitution is that sometimes the rules can be made up as we go along.

So I need just to say a word about Mr Hemming. No, I am not going to reminisce about the former Notts and England off-spinner, Mr Eddie Hemmings. Sadly not today. I refer to the other Mr Hemming, the distinguished parliamentarian. He may be better known to those of you who practise in the Family Division: see e.g. *Doncaster MBC v Haigh* [2011] EWHC 316 (Fam). But he won't mind my saying that he is gaining wider acclaim. He felt it to be his duty, hearing that a certain footballer had obtained an injunction anonymously, to intervene on the floor of the house and courageously to announce the name – with all the quiet discretion he could command. The story has rather an Old Testament flavour to it, does it not? Mr Hemming stands up heroically as David against the judiciary as Goliath. And lo! he smote the judges. Having done so, democracy was apparently vindicated. An elected representative had shown the unelected judiciary where it got off. He is rapidly acquiring the status of "national treasure".

The same thing happened, I gather, on the floor of the House of Lords in relation to an injunction obtained by Sir Fred Goodwin and an anonymous lady. There it was a Lib Dem peer who announced the name of the banker concerned. This too, it seems, was for the good of democracy – although the peer concerned had to be even more quietly discreet than Mr Hemming, because someone might spot that he or she, being a member of the Upper House, was almost as “unelected” as the judge who had granted the injunction in the first place. But the people rejoiced nonetheless.

The ultimate accolade for Mr Hemming came a little later on *Question Time*, when an eminent former chairman of the Press Complaints Commission said “I am glad that parliamentary supremacy has been restored”.

Now I expect that you and I studied constitutional law a few generations apart, not to say aeons apart, but, even so, I bet we have a notion of the supremacy of Parliament that is rather different from that. As I understand my constitutional law, it has something to do with Parliament, as a body, being free to legislate as it sees fit. That is an important and valuable notion in a democracy – qualified in some respects as it plainly now has to be by external factors. One of the natural concomitants of parliamentary supremacy, you might think, is that judges are under a duty to do their best to uphold the will of Parliament as expressed in legislation. It is the supremacy of Parliament as a body that matters, not the supremacy of individual parliamentarians. It is salutary to acknowledge sometimes the separation of powers. They can become rather blurred. If individual parliamentarians think it appropriate to act as one-person tribunals of appeal from judicial decisions, and without troubling to read the evidence, it may not be the end of civilisation as we know it, but it can lead to a little constitutional untidiness around the edges.

As we take pride in our system of democratic government, and as our representatives seek to proclaim its benefits in other parts of the world, it is important to be very clear as to the structures and mechanisms on which it depends. Parliamentary supremacy is closely intertwined with the rule of law, which depends in part upon popular acceptance and support. The legislature represents the people and derives its law-making legitimacy from that fact. The judges, on the other hand, have always been required to interpret and to apply the law, partly of course common law principles but partly also the law embodied in statute. Moreover, now they are carrying out, at Parliament’s behest, what appears to be this new function of evaluating competing Convention rights and seeking to resolve those conflicts. The judges’ legitimacy in carrying out that particular task derives from Parliament. As the Master of the Rolls put it in the Eton College lecture, it has been left to judges to “implement the policy”. It is essential in vindicating the supremacy of Parliament as a law-making body that judges can make orders that are effective and that they continue, when necessary, to do so. It might be thought that it is not for individual parliamentarians, whether elected or unelected, or indeed for any other individual citizen, to hinder or render ineffective the judicial implementation of Parliament’s will. That is the very antithesis of parliamentary supremacy.

If it should happen that parliamentarians as a law-making body, not as individuals, decide that there should not be a law of privacy or that, if there is to be, it should protect only those who are not “rich or famous”, then that must be put into effect as legislation. What would be quite unacceptable is for judges in the meantime *not* to give effect to Parliament’s clear intentions, as so far expressed, because of media pressure. I do not, of course, seek to underestimate the difficulties of changing the law, so as to give automatic priority to one Convention right over another. That would not be consistent with Council Directive 1165 of 1998 or with Strasbourg jurisprudence. But that is beside the point. What I am concerned with is the

fundamental principle that everyone in a free and democratic society can expect the judges to carry out the will of Parliament until such time as another policy is formally enacted. It is not for judges to decide that a particular law has become unpopular or unenforceable. That is for the politicians.

For the moment, however, it is beyond argument that the law of privacy has been sanctioned by Parliament, and so interpreted by the House of Lords, and the judges will continue to do their best conscientiously to carry it into effect. That will require from time to time that they should grant injunctions against the media. If politicians decide that is wrong, well and good. Let the law be changed via the democratic process. What is impermissible is for politicians to say to the media, "Don't blame us. It is the judges who have introduced this wretched law". Parliamentary supremacy requires parliamentary responsibility and political accountability. Any politician can get a laugh or a cheap round of applause from criticising judges. Of course. They are a soft target and cannot answer back. But it serves nobody's interests to pretend that Parliament and the judiciary are anything other than partners in giving effect to the rule of law.

I want to conclude by expressing good wishes to the young Bar and, in particular, the hope that this generation has the opportunity to succeed at what barristers do best. Whatever new roles the Bar may take on, it is vital that it continues to perform its traditional function as an independent referral body. It is important that there should be available, to the general public, genuinely independent advice and an independent body of professionals who can, where necessary, discharge the functions of court advocates. It is a role much misunderstood and misrepresented. Judges, and in particular full-time judges, are naturally the main consumers and beneficiaries the advocates' skills. Daily, throughout the country, we benefit from the experience of independent advocates and, without them, criminal and civil justice would surely be undermined. It is the steady determination of the advocates, both senior and junior, which ensures that the administration of justice can be carried out not only efficiently but also effectively. The trust that judges place in professional advocates is essential in the speedy disposal of their caseloads. So when I say that I wish you well, it is not merely a courteous gesture to my hosts (although I hope it is that too) but rather it is a recognition that the public interest requires that, in the years to come, today's young Bar not only survives but positively flourishes.