

## Another strap across the bottom

**Joshua Rozenberg**

Ladies and gentlemen, I feel honoured and more than a little alarmed to be invited by 5RB to give a keynote address here this morning. As a reporter, I know my place: I should be sitting at your feet writing down what all you lawyers have to say. But we hacks will do anything if you pay us enough – which is why I find myself standing up when all of you are sitting down.

My brief was to talk about changes in privacy law and their effect on the media. So, like any journalist, I started looking around for something to plagiarise and came across a book called *Privacy and the Press*. This is really rather good, I thought, as I leafed through it. I can understand it; I even agree with it. Then I remembered I'd written it.<sup>1</sup>

It was completed less than five years ago, in November 2003. I want to read you a paragraph from it.

When the Human Rights Act 1998 came into effect in October 2000, it was seen as the spark that would ignite a new privacy law, consuming freedom of expression in its flames. Three years later, the tinder was barely warm. Judges were certainly not ignoring the human rights legislation. But they had been approaching it cautiously, sometimes maintaining that whatever decision they take is one they would have reached if they had simply relied on the good old English common law.<sup>2</sup>

What a long time ago that seems. There were plenty of straws in the wind, of course. In 1994, Laws J famously said that publishing an unauthorised telephoto picture of someone “engaged in some private act” would be just as much a breach of confidence as publishing a lost or stolen diary in which the act was described.<sup>3</sup> In 1996, Sir Thomas Bingham predicted in a public lecture that the judges would develop a law of privacy. “It should strike only at significant infringements,” he said, “such as would cause substantial distress to an ordinary phlegmatic person”.<sup>4</sup> Also in 1996, Lord Hoffmann had argued that “the individual's right to dignity and respect” should be recognised at common law.<sup>5</sup> But that was as far as we had got.

I have called this talk “Another strap across the bottom”. Many of you will have guessed that this is a direct quotation from the judgment of Eady J in *Mosley v News Group Newspapers Ltd*<sup>6</sup>, a decision that will dominate – if I can use that term – our discussions today. In law, though – as in life – context is everything. A “strap”, in newspaper jargon is a long thin headline running above several columns of type. Eady J was, in fact, referring to “a strap across the bottom of the page”.<sup>7</sup>

The facts of the case will be well known to you but that's no reason why we shouldn't enjoy them once again. They were described by Eady J with a piquancy that the claimant must surely have relished.

Max Mosley sued the News of the World over an article that was published on March 30 this year, at the same time as extracts from a clandestine video recording were placed on the newspaper's website. He sued the publishers for breach of privacy, not libel; but that didn't mean he was ruling out a future claim for defamation.

Mosley, who is 68, claimed that the published material was inherently private, consisting as it did of sado-masochistic activities in which he had been involved. The judge helpfully explained that, on what is known as “the scene”, it is more common nowadays to refer to “BDSM” – “a term which embraces bondage, discipline, domination and submission or sado-masochistic practices”.

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For convenience, however, he would continue to use the “more familiar” term “S and M”.<sup>8</sup> I have to admit I’m more familiar with M&S – but that must be a different scene.

The newspaper also printed photographs from the video recording. Eady J carefully noted that people’s “private parts” were discreetly blocked out – in one case, by a small chequered flag.<sup>9</sup>

A week later, the newspaper carried an interview with one of the five women who had taken part in the S and M activities. Woman E, as she was called, was photographed wearing a peaked cap, white shirt, leather skirt and thigh-length boots. This time it was her face that was blocked out.

The main factual dispute between the parties was over whether there had been a Nazi theme to the events that had taken place two days before the first article appeared. The newspaper said there had been. Mosley, son of the wartime British fascist leader, is president of the motor-racing governing body. According to the News of the World, there was a public interest in disclosure – and one that outweighed the claimant’s right to privacy.

Not surprisingly, the allegations of a Nazi element were vehemently denied by Mosley and four of those who took part, Women A to D. The fifth participant, Woman E – the one with the leather skirt and thigh-high boots – had been paid by the News of the World to record the proceedings with a video camera concealed in such clothing as she was wearing.<sup>10</sup>

She was to have given evidence for the newspaper. But – in the antithesis of a George Carman coup de théâtre – Woman E became a surprise non-witness, dropping out on the fourth day of the trial. It’s not clear whether the fact that her husband was an MI5 officer had anything to do with this; he was forced to resign after Mosley took steps to find who was responsible for his entrapment. But Woman E’s testimony might not have made much difference, as the judge explained. The best evidence was the video recording she had made.

James Price QC for Mosley submitted that nobody could think that his client’s behaviour had anything to do with Nazism or concentration camps. It was simply “standard” S and M. And the judge agreed. The women had not been wearing Nazi costumes. “The facts that the jacket corresponded to the modern Luftwaffe uniform and that German was spoken in the second of the two scenarios acted out on 28 March cannot be identified with Nazism,” Eady J said.<sup>11</sup>

The newspaper had also relied on the fact that Mosley had been shaved by one of the women. So, too, were concentration camp inmates – but not in quite the same way. Mosley enjoyed having his bottom shaved, the judge noted. I quote: “He explained to me that while this service was being performed he was (no doubt unwisely) ‘shaking with laughter’. I naturally could not check from the DVD,” Eady J explained, “as it was not his face that was on display.”<sup>12</sup>

There’s one more passage I’d like to read you before we get on to the serious stuff. It relates to another S and M session some three weeks earlier. Apparently, Mosley liked to record these sessions as a memento. This is Eady J’s description:

“There seems to be some sort of game involving rivalry between blondes and brunettes. At one point, the dark-haired woman lying on the sofa raises her head and cries out ‘Brunettes rule!’ Within a moment or two, a voice from off-camera can be heard... gasping out words to the effect ‘We are the Aryan race – blondes’”.<sup>13</sup>

I interpose to say the newspaper regarded these comments as a reference to Nazi racial policies.

“When asked about this, the claimant said that he had no recollection of any such remark being made and, indeed, that it was perfectly possible that his hearing aids would not have picked this up in all the excitement.”

Referring to a literacy device first described by the poet Horace, the judge said there was “no reason to suppose that it was other than a spontaneous squeal by Woman A in medias res” – in the middle of things.

Eady J accepted that if Mosley really had been “mocking the humiliating way the Jews were treated” or “parodying Holocaust horrors”, as the newspaper had alleged, then there could have been a public interest in that being revealed – at least to those in the motor sport governing body to whom he was accountable. But since the judge had seen no such mocking and not even any evidence of imitating, adopting or approving Nazi behaviour, he could find no “legitimate public interest to justify either the intrusion of secret filming or the subsequent publication”.

Where does this leave the media? We know where it leaves the News of the World – paying damages of £60,000 and Mosley’s estimated costs of £450,000 plus its own costs of £400,000 – more than £900,000 in total. Neville Thurlbeck, the paper’s chief reporter, emerges as someone whose recollections are as erratic<sup>14</sup> as his spelling of “anonymity”.<sup>15</sup>

But what effect will it have on other journalists? A leader in The Times described the judgment as a “blunt reminder to all journalists that we stand and fall by the accuracy of our reporting”. It then referred to the judge as “Mr Eady” – a solecism corrected in later editions but not on-line.<sup>16</sup>

It is true that if our reporting is not accurate we may face the pitfalls of libel. I have recently written for both the Daily Telegraph<sup>17</sup> and the Law Society Gazette<sup>18</sup> about the prosecutor of the International Criminal Court, Luis Moreno-Ocampo. I believe he has shown poor judgment and I have called for his resignation. That’s fair comment – as I hope you would agree. But I have also referred to allegations against him of sexual impropriety. That’s ok because they are mentioned in a tribunal ruling. Though it’s a pretty obscure tribunal in Geneva, its judgments attract qualified privilege. Even so, before each piece was published it had to be read for libel. And each libel lawyer required me to stress that the allegations of sexual misconduct against Moreno-Ocampo were never proved – as I do again now. The last thing I would want to provoke is a libel claim against the organisers of this conference – though I imagine they could cope.

But would the prosecutor of the International Criminal Court really want to sue me for libel? I very much doubt it – but you never know. Best to be careful, just in case. And that’s the chilling effect of libel.

Now we have the chilling effect of privacy. Eady J went to great pains to play this down. There is nothing “landmark” about this decision, he said. “It is simply the application to rather unusual facts of recently developed but established principles.”<sup>19</sup>

These principles, he stressed, were approved by Parliament when it passed the Human Rights Act 10 years ago. It was not a case of “unaccountable” judges “running amok”.<sup>20</sup> Even before 1998, the courts had been taking increasing account of Articles 8 and 10 of the Human Rights Convention because of the need to interpret domestic law consistently with Britain’s international obligations.<sup>21</sup>

“Nor can it seriously be suggested,” Eady J continued, “that the case is likely to inhibit serious investigative journalism into crime or wrongdoing, where the public interest is more genuinely engaged.”<sup>22</sup>

I wonder. In theory, of course, Eady J is right. As a first-instance judge, there is not much he can do to change the law. True, he awarded Mosley much higher damages for breach of privacy than any court had awarded before, but £60,000 was in line with recent settlements and, if anything, struck me as rather on the low side – especially if we are to believe, as the judge apparently does, that “he is hardly exaggerating when he says that his life was ruined”.<sup>23</sup> And Mark Warby QC, for News Group Newspapers, persuaded Eady J that exemplary damages could not be awarded in a claim for infringement of privacy. The judge agreed with counsel that it would be “somewhat eccentric” to graft “an alien anomaly from the common law” on to Human Rights Convention values and Strasbourg jurisprudence.

But the judge doth protest too much, methinks. He clearly expected the media criticism that he subsequently received. But I don't think he anticipated it – in the sense of dealing with it in advance. Perhaps there was no way in which he could have done.

When Eady J says his ruling will not inhibit investigative journalism where the public interest is engaged, I expect he has in mind the test laid down by the Strasbourg court in the Princess Caroline case, *von Hannover v Germany*.<sup>24</sup> There, the court said “the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest”.

With the benefit of hindsight – an advantage that judges have over journalists – it is not too difficult to see whether an intrusion into someone's private life is in the public interest. But a news editor sending a reporter to investigate a politician cannot know whether this will produce sufficient evidence of wrongdoing to justify any breach of privacy.

The problem is particularly acute for newspapers that are seeking to expose or detect crime. Eady J said it was “verging on desperation” for the News of the World to have claimed that Mosley was inciting or aiding an assault on himself, as evidenced by “the application of the large piece of Elastoplast on his right buttock”.<sup>25</sup>

In the judge's view, exposure of a “technical or trivial” crime on private property would not be an automatic justification for intrusive journalism.

“Would it justify installing a camera in someone's home, for example, in order to catch him or her smoking a spliff?” the judge asked.<sup>26</sup> “Surely not,” he concluded. “There must be some limits and, even in more serious cases, any such intrusion should be no more than is proportionate.” It was not up to the media to expose sexual conduct that does not involve any “significant breach of the criminal law”, the judge continued. “That is so whether the motive for such intrusion is merely prurience or a moral crusade.”<sup>27</sup>

But what is “significant”? Certainly not adultery or sado-masochism, Eady J felt obliged to conclude. And how is an editor expected to know?

“The new methodology”, as the judges have termed it, requires an “intense focus” on the facts of the individual case. Privacy, protected by Article 8, must be balanced against free speech, protected by Article 10. Neither takes priority. In the end, it all depends on what the individual judge decides. And that's not much help to the newspapers unless Eady J is going to decide every privacy case himself for the foreseeable future – which I suppose he might.

We know, of course, where he stands. Judges must not refuse to enforce human rights “merely on grounds of taste or moral disapproval”, Eady J said. However much we may disapprove of sado-masochism, we cannot “hound” those who practise it or “detract from their right to live life as they choose”.<sup>28</sup>

For a social liberal like Eady J, it seems that pretty well anything goes. Remedies must not be refused because an individual judge “finds the conduct distasteful, or contrary to moral or religious teaching”. The private conduct of adults is no-one else's business, so long as it doesn't disturb the neighbours or frighten the horses. “The fact that a particular relationship happens to be adulterous, or that someone's tastes are unconventional or ‘perverted’, does not give the media carte blanche.”<sup>29</sup>

What a long way we have come. Remember Jamie Theakston? He was the Top of the Pops presenter photographed in a brothel nearly seven years ago. Theakston went out drinking with friends in Soho and found himself being “ushered” into a room on his own by a girl who – as he put it – “performed a sex act on me”. Happens to us all, I suppose. Ouseley J refused Theakston's application for an injunction to stop the People newspaper reporting the incident, though the judge did ban publication of the photographs.<sup>30</sup>

The Human Rights Act was certainly in force by the time his case was heard in 2002; and so Ouseley J had to balance Article 8 against Article 10. But the caterpillar of confidence had not yet metamorphosed into the butterfly of privacy. In those days you still needed to show that the information concerned had been imparted in circumstances importing an obligation of confidence.<sup>31</sup>

Ouseley J said that “if this sexual activity in that fleeting relationship in this location were invested with confidentiality, the concept of confidentiality would become all embracing for all physical intimacy” unless a line were drawn.

He continued: “The relationship between a prostitute in a brothel and the customer is not confidential of its nature and the fact that they participate in sexual activity does not in my judgment constitute a sufficient basis by itself for the attribution to the relationship, if such it be, of confidentiality.

“It is difficult to see why the protection of confidentiality should be imposed essentially for one party to a fleeting transaction for money when there is no reason to suppose that at the time the other party would have considered the relationship or the activity confidential for one moment.”<sup>32</sup>

Now it's quite true that the dominatrices who consorted with Max Mosley did not regard themselves as prostitutes – they were more like friends who hit it off together, I suppose. But I do wonder if Ouseley J would have awarded Mosley £60,000 in 2002. It's not just that the judge seemed unpersuaded by dicta in *Douglas v Hello!* more than a year earlier that the law no longer needed to “construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy”.<sup>33</sup> It is also that Ouseley J clearly disapproved of such activities in a TV presenter who appealed to young people. But, as I say, the judge could see no public interest in publication of the photographs.

The same thread runs through other judgments delivered during that year. Garry Flitcroft, the footballer caught “playing away from home” with a lap-dancer and a nursery school teacher, also failed in his attempt to stop the *People* newspaper from naming him. Giving judgment in March 2002,<sup>34</sup> Lord Woolf thought the freedom of the press was more deserving of protection than the confidentiality of fleeting sexual relationships – although the kindest thing to say about this particular judgment is that it has not stood the test of time.

And that was the year in which the Court of Appeal allowed an appeal by the *Daily Mirror* against Naomi Campbell's victory in the High Court. “Given that it was legitimate for the [newspaper] to publish the fact that Miss Campbell was a drug addict and that she was receiving treatment, it does not seem to us that it was particularly significant to add the fact that the treatment consisted of attendance at meetings of Narcotics Anonymous,” said the appeal judges, headed on this occasion by Lord Phillips, who was then Master of the Rolls. You can tell they were still thinking about confidence – and its equitable origins – from their comment that it was not obvious that “the peripheral disclosure of Miss Campbell's attendance at Narcotics Anonymous was, in its context, of sufficient significance to shock the conscience and justify the intervention of the court”.<sup>35</sup>

But all that was before the summer of 2004 – when two of the world's most photographed women snapped back at the snappers. First, Naomi Campbell won her appeal to the House of Lords, shaking off the need for an initial confidential relationship and establishing a new tort called “misuse of private information” that would protect information where there was “a reasonable expectation of privacy”.

Of course, Lady Hale remarked confidently, there was nothing to stop anyone photographing the fashion model as she walked down the street: “readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk”.<sup>36</sup>

But even that simple pleasure was denied to us a month later when the European Court of Human Rights found for Princess Caroline of Monaco.

“The court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life—even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.”<sup>37</sup>

And that, we now know, applies not just to a princess but to a 19-month-old toddler called David Murray. He didn't know his picture had been taken when he popped out to the shops or wherever he was being taken in his buggy. Neither did his father Neil. And nor did his mother Joanne, better known as JK Rowling. But, said the present Master of the Rolls, Sir Anthony Clarke – perhaps a trifle inelegantly – “A child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication which the person who took or procured the taking of the photographs knew would be objected to on behalf of the child.”<sup>38</sup> True, this was only the first step. “Then comes the balance which must be struck between the child's rights to respect for his or her private life under article 8 and the publisher's rights to freedom of expression under article 10.”<sup>39</sup> And which side would that favour? Well, said the Court of Appeal, probably the child's right to private life; it is hard to see what contribution a photograph of a child in his buggy could make to a “debate of general interest”.

Even if Eady J is right to say that the Mosley case does not change the law, it has certainly had an impact on the press. Just think for a moment of the context. All newspapers are losing circulation. Young people are simply not buying them. Commuters are reading free-sheets instead. Although sex still sells, readers are more interested in whether gas prices are going up than they are in some obscure but important financial scandal. Investigative reporting is expensive and you don't even know whether it is going to produce a story in the end.

I'm not seeking any sympathy here for the News of the World. Huge numbers of respectable people will have been drawn to its website by the realisation that it was their painful duty to keep abreast of current affairs by watching a video of people doing rude things to each other. That web traffic must surely have translated into advertising revenues. The newspaper enjoyed huge publicity from the case. And that won't have been affected by the fact that it lost: people tend to forget that bit.

But other publications – particularly local papers, would not be able to swallow a legal bill of nearly £1 million without choking – perhaps fatally. Eady J's judgment will have alerted them to developments in the law of which they were not consciously aware, changes that editors now claim they hardly noticed when the Human Rights Bill was going through Parliament 10 years ago. Very few publishers are going to risk being sued for misuse of private information. It's easier to run another story instead.

And if they are caught, it's much cheaper to settle. It's always galling to watch a newspaper pay agreed libel damages for something that was probably true but which the publisher is unable or unwilling to justify in court. No doubt we shall see privacy cases settle in future because the newspaper cannot be sure that Article 10 will trump Article 8.

That said, any newspaper which defends a privacy case on appeal will risk saddling the media with punitive damages in future. As I mentioned earlier, Eady J ruled that exemplary damages were not available for infringement of privacy because they had never been awarded in such a case before.<sup>40</sup> He also found no evidence that the newspaper had been reckless as to the law and that it had calculated it stood more to gain by publishing than it would lose by paying compensatory damages – the basis for awarding exemplary damages in tort.<sup>41</sup> Indeed, he was not persuaded that infringement of privacy was a tort – yet.<sup>42</sup> But the judge speculated that if an appeal were to reach the House of Lords – or the Supreme Court as it will soon become – then invasion of privacy might be classified as a tort and exemplary damages may be awarded.<sup>43</sup>

Commenting on Eady J's judgment in The Daily Telegraph, the journalist Brian MacArthur rightly accepted that there was no genuine public interest in Mosley's sex life. But MacArthur, with his 35 years' experience as a newspaper executive, said it would be “cases where there is a genuine public interest in exposure that will suffer because of the News of the World's foolish publication.

Each successful privacy case encourages public figures who are being investigated for genuine corrupt or criminal behaviour to seek injunctions to stop publication on the ground that their privacy is being breached.”<sup>44</sup>

MacArthur thought the ruling would mean the end of kiss-and-tell stories. Good thing too, he acknowledged. But it would also “seriously inhibit legitimate investigations, for example, into drug-taking (think Pete Doherty, Amy Winehouse) or adultery among politicians (think David Mellor, Tim Yeo, John Major, John Prescott).”

I agree: I do believe the judgment is going to have a chilling effect on freedom of expression. According to Mosley himself, though, that’s “complete nonsense”. “What emerges from the judgment,” he told the Sunday Telegraph, “is that it is perfectly all right to reveal details of someone’s private life if there is a genuine reason to do so but it is not all right to do so for light entertainment or because an editor decides to destroy someone’s life for no better reason than to sell a few more newspapers.”

In his view, the courts should not be arbiters of morality. “Modern adults don’t care what other people do as long as it’s legal, in private, and consensual between adults. By any ordinary standards, oral sex is disgusting and absurd but, if people like doing it, why not?”<sup>45</sup>

Because, according to Lord Carey, the former Archbishop of Canterbury, “unspeakable and indecent behaviour, whether in public or private, is no longer significant under this ruling”. Writing in the News of the World, he said he was “deeply sad” that “public morality” was a victim of Eady J’s judgment.<sup>46</sup>

This view had been foreshadowed a couple of days earlier<sup>47</sup> in the Daily Mail’s front-page headline, What Price Morality? – which I don’t think was intended as a defamatory reference to the claimant’s leading counsel. It was telling that the Mail illustrated the story with an old photograph of Mosley celebrating with three blondes – “pit-stop girls”, the paper called them – rather than the previous day’s picture of Mosley emerging victorious from the High Court.

I think we can share Lord Carey’s concerns about declining moral standards without accepting his view of the legal process. “Without public debate or democratic scrutiny the courts have created a wholly new privacy law,” he said, completely forgetting the row that raged over freedom of expression<sup>48</sup> while he sat on the Bishops’ bench in the House of Lords.

A similar memory lapse was suffered by Stephen Glover, a former editor of the Independent on Sunday and now a columnist at the Daily Mail. “Of course, it is Parliament which passed the Human Rights Act,” he wrote, “but MPs seem to have had no conception of how Article 8 might be manipulated by ingenious lawyers and interpreted by sympathetic judges to construct a law of privacy.”<sup>49</sup>

As all of you will remember, while the Human Rights Bill was going through Parliament the Government added a clause that ministers said was “specifically designed to safeguard press freedom”. It was introduced in response to pressure from, among others, the then chairman of the Press Complaints Commission, Lord Wakeham. As it happens, I believe that section 12 of the Human Rights Act<sup>50</sup> is an early example of a phenomenon we have seen on at least a couple of occasions since;<sup>51</sup> legislation that’s meant to look good but not change the law in any way.<sup>52</sup> But now is not the time to debate whether requiring courts to have “particular regard” to freedom of expression actually means anything; all I am saying is that nobody can claim a privacy law was introduced by the Human Rights Act without MPs noticing.

Time to sum up. A lot of commentators have seen the Mosley judgment as the end of “kiss-and-tell”. I think that’s right – and a good thing. Logically, the Human Rights Act should have put an end to unjustified invasions of privacy. But the life of the law is not always logical. It needs a high-profile case and hefty damages before newspapers spot what is going on.

And, even now, some of them don't get it. Some commentators still seem to think that you'll be ok if you get your facts right. This seems to be based on a misunderstanding of the Nazi factor in Eady J's judgment; that the newspaper would have been in the clear if its allegations had been correct. It would have been, but only because publication would then have been in the public interest.

The whole point of privacy is that truth is not an absolute defence. If I publish true but private facts about a private individual, my right to freedom of expression is not going to trump that individual's right to privacy. Granted, the press have less interest in private individuals than they have in public figures. But I still don't think editors have grasped what privacy really means. Once they do, our newspapers are going to be a lot thinner than they are now.

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<sup>1</sup> OUP, 2004. Reissued in paperback with a new preface, 2005.

<sup>2</sup> Page 33.

<sup>3</sup> *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, 807.

<sup>4</sup> Lord Bingham, *The Business of Judging*, OUP, 2000.

<sup>5</sup> See Rozenberg, *Privacy and the Press*, page 32.

<sup>6</sup> [2008] EWHC 1777 (QB), July 24, 2008, para 33.

<sup>7</sup> I am grateful to Desmond Browne QC for alerting me to the judge's presumed joke.

<sup>8</sup> Para 4.

<sup>9</sup> Para 30.

<sup>10</sup> See Eady J's earlier ruling refusing injunctive relief, [2008] EWHC 687 (QB), April 9, 2008, para 5. The judge is careful not to repeat his own quips.

<sup>11</sup> Para 51.

<sup>12</sup> Para 53.

<sup>13</sup> Para 67.

<sup>14</sup> Para 97.

<sup>15</sup> Para 81.

<sup>16</sup> [http://www.timesonline.co.uk/tol/comment/leading\\_article/article4393319.ece](http://www.timesonline.co.uk/tol/comment/leading_article/article4393319.ece)

<sup>17</sup> <http://www.telegraph.co.uk/news/newstoppers/lawreports/joshuarozenberg/2446064/Omar-al-Bashir-of-Sudans-prosecutor-Luis-Moreno-Ocampo-should-resign.html>

<sup>18</sup> <http://www.lawgazette.co.uk/opinion/columnists/courting-controversy>

<sup>19</sup> Para 234.

<sup>20</sup> Para 7.

<sup>21</sup> Para 7.

<sup>22</sup> Para 234.

<sup>23</sup> Para 236.

<sup>24</sup> (2005) 40 EHRR 1, para 76.

<sup>25</sup> Para 113.

<sup>26</sup> Para 111.

<sup>27</sup> Para 127.

<sup>28</sup> Para 127.

<sup>29</sup> Para 128.

<sup>30</sup> *Theakston v MGN Ltd* [2002] EMLR 22.

<sup>31</sup> See Megary J in *Coco v A N Clark (Engineers) Ltd* [1968] FSR 415, [1969] RPC 41.

<sup>32</sup> *Theakston v MGN Ltd* [2002] EMLR 22.

<sup>33</sup> Per Sedley LJ in *Douglas v Hello! Ltd (No 1)* [2001] QB 967, para 126.

<sup>34</sup> *A v B plc* [2003] QB 195.

<sup>35</sup> *Campbell v MGN Ltd* [2003] QB 633.

<sup>36</sup> *Campbell v MGN Ltd* [2004] 2 AC 457, para 154.

<sup>37</sup> *von Hannover v Germany* (2005) 40 EHRR 1.

<sup>38</sup> *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, para 57.

<sup>39</sup> Para 58.

<sup>40</sup> Paras 197, 203.

<sup>41</sup> Para 210.

<sup>42</sup> Para 185.

<sup>43</sup> Para 184.

<sup>44</sup> July 25, 2008.

<sup>45</sup> <http://www.telegraph.co.uk/news/uknews/2461950/Max-Mosley-I-will-always-be-remembered-for-my-private-sex-life.html>

<sup>46</sup> July 26, 2008. His comments are not on the newspaper's website but were reported in other publications.

<sup>47</sup> July 25, 2008.

<sup>48</sup> And freedom of religion – see s. 13 of the Act.

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<sup>49</sup> *Daily Mail*, July 25, 2008.

<sup>50</sup> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section—

"court" includes a tribunal; and

"relief" includes any remedy or order (other than in criminal proceedings).

<sup>51</sup> See s.1 Compensation Act 2006 which "reflects the existing law" on the deterrent effect of potential liability; and s.76 Criminal Justice and Immigration Act 2008 which "clarifies" the law on self-defence (quotations from Government explanatory notes).

<sup>52</sup> See Rozenberg, *Privacy and the Press*, pp 129-32.