
**Commentary on a paper by
Professor Barbara McDonald, Sydney Law School
“An action for (serious) invasion of privacy”
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1. There is one particular aspect of Professor McDonald’s paper which I will comment upon. It is the proposition that any publication which reveals true private information cannot be adequately compensated in money.

2. Is that proposition correct? I think so, particularly when one has regard to the underlying purpose of a law designed to protect privacy.

3. Before considering this underlying purpose it is useful to begin by consider what I consider the proper role the modern law of defamation plays. That role, particularly in the post 2005 Defamation Act era, gives effect to the overriding principle that truth justifies any publication at all. If a publication can be proved true, then regardless of how private, or how humiliating, or how lacking in public interest the content of the publication is the person to whom it relates has no legal remedy.

4. If a plaintiff successfully sues for defamation it is presumed that the defamatory publication is false and, in the ordinary course, damages are awarded to reflect, amongst other things, vindication of a plaintiff's reputation. It is generally accepted that reputation can in fact be vindicated by an award of damages, and of course a verdict of a judge or jury.
5. Unlike the cause of action in defamation, an action which seeks to restrain a breach of confidence or to protect privacy will invariably involve information that is true.¹ It follows that without proper restraint once privacy or confidentiality has been infringed any damage (in whatever form it may take) is done and will only be augmented by pursuing court action.
6. It is obvious that there are very different underlying values which the law of defamation and the law of privacy and confidence seek to protect.
7. If it be the case that the true focus of protecting privacy is to protect human autonomy and dignity and indeed the right to control the dissemination of information about one's private life (as the old House of Lords said it was in *Campbell's case*²) then it seems to me to follow that Professor McDonald's proposition is correct: an infringement of privacy cannot be effectively compensated by a monetary award.

¹ There is authority which supports the proposition that this is not always the case. See *McKennitt v Ash* [2008] QB 73 at [79]-[80]; *WER v REW* [2009] EMLR 17.

² *Campbell v MGN Ltd* [2004] 2 AC 457 at [50] (Lord Hoffmann); [157] (Baroness Hale); [12] (Lord Nicholls).

8. That proposition has been endorsed in the United Kingdom. In *Mosley's case*³ (to which I will return) Mr Justice Eady, the former judge in Charge of the Jury List in the Queen's Bench division of the High Court, observed that *"it has to be accepted that an infringement of privacy cannot be effectively compensated by a monetary award. Judges cannot achieve what is, in the nature of things, impossible. That unpalatable fact cannot be mitigate by simply adding a few noughts to the number first thought of"*.
9. The name Max Mosley will be familiar to some: he is the former head of the FIA and son of Sir Oswald Mosley the founder of the British Union of Fascists. He is perhaps best known following his high profile stoush against a British Tabloid.
10. The situation he found himself in is a useful illustration of why there are legitimate arguments that a person should, at the very least, have the opportunity to seek an interim injunction prior to private information being published about them and why a final injunction after a trial can prove a useless ineffectual remedy.
11. Mr Mosley was the subject of two stories published in the now defunct News of the World, which at the time of its last edition had a weekly circulation of over 2,500,000 and which also maintained a website from which the majority of its stories and other visual aids, for example audio and video footage, could be downloaded and viewed.
12. The two articles concerning Mr Mosley were, on any view, articles of a sensational nature. The first was published under the main heading **"F1 BOSS HAS SICK NAZI ORGY WITH 5 HOOKERS"**

³ *Mosley v News Group Newspapers (No 3) 2008] EMLR 20 at [231]. .*

and under the subheading “**SON OF Hitler-loving fascist in sex shame**”.

13. The second article was an online posting of still images and video footage of the headline event.
14. The nature of the stories (and the footage) is self-explanatory and I will not in the interests of public decorum repeat them again. They are however matters which are detailed in a judgment which is publically available. What is relevant to the present debate are the events leading up to the publications.
15. The events, as described in the headline, took place in a private residence, a flat in Chelsea which was rented by Mr Mosley. NOTW had requested one of the five guests of Mr Mosley to secretly video tape the event. That guest was paid to do so. She was also paid to tell her story, which found itself on the front page.
16. The first Mr Mosley knew of the video tape or for that matter the story was upon seeing a copy in his local newsstand. He received absolutely no prior warning of the intention to publish.
17. Other than the reference to any Nazi theme (which was particularly sensitive to Mr Mosley, in view of his father – at whose wedding Adolf Hitler was a guest in 1936) Mr Mosley agreed that the events depicted in the video footage and the subject of the story were true. There was therefore little practical use in suing for defamation.
18. Almost immediately after NOTW hit the stands and the web footage went live Mr Mosley sought an interim injunction restraining further

publication, pending the conclusion of proceedings which he was in the process of filing.

19. By the time that application was heard – I should say to their credit NOTW removed the online video footage pending the hearing the of the application but it had by that stage the damage had been done. The footage had been live for two days and the print edition had been distributed. Indeed the evidence demonstrated that the online video footage had been viewed 1.4 million times (over the course of two days), 3,000,000 copies of the hard copy article had been printed and distributed and a further 400,000 viewers had read the article on the newspaper’s website. Those figures exclude other media outlets who picked up the story and the images and ran similar stories.

20. The application for an interim injunction, which was heard by the trial judge Mr Justice Eady, failed. The judge did however make the following observation⁴:

“ ... a point may be reached where the information sought to be restricted, by an order of the Court, is so widely and generally accessible “in the public domain” that such an injunction would make no practical difference.

... if someone wishes to search on the Internet for the content of the edited footage, there are various ways to access it notwithstanding any order the Court may choose to make imposing limits on the content of the News of the World website. The Court should guard against slipping into playing the role of King Canute. Even though an order may be desirable for the protection of privacy, and may be made in accordance with the principles currently being applied by the courts, there may come a point where it would simply serve no useful purpose ... It is inappropriate for the Court to make vain gestures.”

⁴ See *Mosley v News Group Newspapers Ltd* (No 1) 2008] EWHC 687 (QB) at [33] to [34].

21. The “dam [had] effectively burst” and that despite Mr Mosley satisfying the Court, on an interim basis, that his cause of action was a strong one – the judge described the material as intrusive and demeaning and that there was no legitimate public interest in further publishing – the application was refused.
22. Ultimately, Mr Mosley had his day in court and was awarded £60,000 GBP. The judge held there was no public interest or other justification for publishing the stories.
23. For the £60,000 GBP Mr Mosley endured a very public and necessarily intrusive cross-examination and relived the event. I say relived because the case and its subject matter were headline news around the world for some weeks.
24. Was £60,000 GBP an effective or meaningful remedy for a man whose very intimate private life was exposed? People may disagree with me but I don't think it was.
25. The only real benefit of the judgment (which of course remains a permanent record of the event) is that the judge decided there was no “evidence of imitating, adopting or approving Nazi behaviour”. That was an important ruling and was made despite Mr Mosley adopting what sounded like a German accent in the footage in substitute for his usual British accent.
26. That ruling is of course something but it did not mean the underlying information was false, and it did not vindicate Mosley for he was still left with effect of the initial publication which had indeed gone viral and remains available on popular mediums such as YouTube.

27. From a human point of view the effect of the publication on Mr Mosley is something I should briefly mention.
28. At trial, Mr Mosley's examination of chief, conducted by his leading counsel Mr James Price QC, was extremely short; in fact it was limited to a dozen questions. Having admitted to the events which occurred in the flat, and having denounced any suggestion of a Nazi theme to those events Mr Mosley was asked one question on the issue of damages. It was this:

Q There has been a mass of publicity over all of this. Would you very briefly describe the effect of that publicity on you and your family.

A. It had more of an effect on my family than it did on me because my wife and I have been married for 48 years and together for more than 50 years. We met as teenagers, and she never knew of this aspect of my life. So that headline in the newspaper was completely and totally devastating for her, and there is nothing I can say that can ever repair that, but also for my two sons. I do not think there is anything worse for a son than to see in a newspaper, particularly a newspaper like the News of the World, pictures of the kind that they printed. I can think of nothing more undignified or humiliating than that, and if I put myself in their position to see my father in that situation I would find devastating. For me myself, I am a fairly robust person. I have had various times in my life when I have been subject to various verbal attacks, and so I can deal with that and also I am able to retaliate. At least I can bring an action here. I can bring an action on the Continent. I can do something. My family can do nothing except suffer the

consequences for something of course for which they have no responsibility whatsoever.”

29. You may ask why Mr Mosley subjected himself to a very public trial, notwithstanding his private life had already been broadcast by the free press across the globe? Well his evidence before the inquiry currently before Lord Justice Leveson (which is also looking into the activities of News Group Newspapers the former publisher of NOTW) provides some insight as to his decision to do so. Mr Mosley said:

“[MOSLEY] I thought what they'd done was so outrageous I wanted to get these people into the witness box and demonstrate that they were liars. And the only way to do that was to put up with this extremely risky and unpleasant process, which I then decided to do.

COUNSEL ASSISTING THEN ASKED Q. The only other choice was to pack up your tent and beat a retreat, presumably?

THE ANSWER WAS: Indeed, and of course first of all I felt that was the wrong thing to do, because even if I went to some obscure village in the Andes, within a week or two people would know about it, thanks to the News of the World putting it on the Internet, but I also felt that this was typical of some of the things they do, and I was somebody who fortunately had the means and a little bit of legal knowledge, and within 18 months would be free to concentrate anyway. I felt if I don't do it, I don't know who's going to, because the number of people they pick on with a really bad case who have the means to fight it is infinitely small”

30. Mr Mosley has become a public advocate for victims of invasions of privacy. So much so that he took his case one step further this time not against the NOTW but against the United Kingdom government. The case is a human rights case so I will not reflect on it other than to observe that the allegation against the Government was that it had violated its positive obligations under Article 8 of the Convention to ensure respect for his private life, particularly by failing *to require* (as a matter of law) prior notification. That human rights challenge was unsuccessful, but the newspaper was severely criticised for its conduct by the Strasbourg Court.
31. In view of the outcome of his trial, the reasons why the NOTW made no contact – not even a perfunctory attempt – to notify Mr Mosley should be obvious. As Justice Eady held⁵:
- “It is also clear that one of the main reasons for keeping the story “under wraps” until the last possible moment was to avoid the possibility of an interlocutory injunction.
- That would avoid delaying publication and, in a privacy context, would generally mean that a potential claimant would not trouble to institute any legal proceedings at all. Once the cat is out of the bag, and the intrusive publication has occurred, most people would think there was little to gain.”
32. Those comments are, to some extent, reflective of the practical outcome of failing to give prior notification.

⁵ [2008] EMLR 20 at [209].

33. I do not for one moment suggest that Mosley's case is a typical one. It is extreme, and there are, I can imagine, a number of situations where the conduct the NOTW engaged in for the purposes of journalism would be legitimate. For example, had the conduct captured (despite being in a private residence) involved an illegal activity, or there was some other genuine public interest in its disclosure, then I readily accept there are arguments why any claim for privacy should fail.
34. In developing or further developing a cause of action to protect privacy – which I agree should be done through the existing equitable duty of confidence - a very practical issue, bearing in mind of course the proposition that compensation will never *compensate* violations of privacy, is when is the appropriate time to determine whether a claim for privacy should be maintained. Should there be an obligation on the media to inform a potential plaintiff of its intention to publish? If so, what consequence should flow from a failure to do so? Should there be other remedies in place for a situation where an unjustified intrusion into one's private life has occurred without an opportunity to attempt to enjoin a publication?
35. These are questions the answers to which I am certain reasonable minds will differ.
36. As a matter of English law (and depending what, if anything, comes of the Leveson Inquiry) there is no obligation to notify a person of an intention to publish with a view to giving that person an opportunity to seek an interim injunction to prevent publication.
37. The same is true in Australia. However as Professor McDonald has observed in her paper there is very little law on this distinct topic. If

the appropriate means to protect privacy is through the existing action for breach of confidence then I doubt very much – in fact I am certain – that that position is the same.

38. In the defamation context there is of course no obligation to notify a person of an intention to publish information about them. A failure to make contact with a defamed person is however relevant to some defences and, in some cases, damages. But again, the focus of the cause of action is entirely distinct: it seeks to protect false and defamatory facts and an award of damages, not to mention a public judgment, serves as an important means of vindication, in effect a public determination that the material published was false.
39. What should be the position in the case private information? Mr McClintock S.C. will discuss certain means of deterring invasions of privacy, including punitive damages, the risk of losing a licence to broadcast or perhaps the risk of the commission of criminal offence. Those means – which are on any view serious sanctions - may well prove the only effective means – a deterrent means - of preventing a Mosley style situation occurring again. And they do to my mind provide a good compromise.
40. To impose on the media (or for that matter any other person) an obligation to notify a person of an intention to publish potentially private information can have undesirable consequences.
41. For example, and while I accept some will disagree with me, there is still a respectable argument that news is a perishable commodity.
42. Against that proposition is of course the fact that many stories (particularly kiss'n'tell style stories) really do no more than report

information which is “interesting to the public” and not in the public interest: *British Steel Corporation v Granda Television Ltd* [1981] AC 1096 at 1168 (Lord Wilberforce).

43. The private lives of those in the public eye are a highly lucrative commodity for certain sectors of the media. Those type of stories are obviously important so far as commercial imperatives of media organisations are concerned. And it just those imperatives and those stories which allow public interest style stories to continue to be published. To my mind, as a practical and commercial reality, continued legitimate public interest stories cannot exist without the benefit of stories which are nothing more than interesting to the public because it is those stories which sell newspapers and magazines.
44. My own view – for what it is worth (and while I confess to doing work for both plaintiffs and media defendants) – is that it would be undesirable to impose an obligation on the media to notify a potential plaintiff of its intention to publish potentially private information about them.
45. Obviously that position does not prevent a person who gets a tip off about a proposed publication or broadcast from seeking an interim injunction as often happens particularly in view of the invariable practice that a majority of journalists (or their editors) are alive to potential legal issues and do often seek comments from persons the subject of articles. If a person does get a tip off failing to attempt to restrain can, as *Mosley* demonstrates, be catastrophic.
46. In terms of protecting privacy and providing an effective remedy for it, the most practical solution would be those *Mr McClintock S.C.* will

identify. Those means in practical terms will impose legitimate incentives on the media not to publish private information.

47. It will also, potentially at least, make the media think twice before publishing without contact the subject. While I appreciate that a self-policing mechanism I find nothing wrong in principle with allowing the media to form their own opinion and a make a judgment call as to whether it is appropriate to give pre-notification to those potentially adversely affected by publication. That will provide an opportunity at least to seek an interim injunction.
48. If there are appropriate sanctions in the place to deter violations of privacy there is something to be said for the principle: publish and be damned.

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