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# OPEN JUSTICE AND PRIVACY

PAUL WRAGG\*

## 1. INTRODUCTION

How is the law to react when a claimant wishes to conceal the fact of his arrest for fear that damage to his private and family life and/or reputation would occur if it was known? It is a well-established legal principle that legal proceedings should be heard in public and freely reported. This is subject to the exceptional circumstances in which the administration of justice would be disserved by this publicity. Should those accused of terrible crimes, but not charged, be protected by this exception? This is a subject that has attracted relatively little critical comment in the academic literature, despite its prominence in the public debate, particularly following high profile arrests under Operation Yewtree and other such police investigations.<sup>1</sup> By examining the case law, including the recent Supreme Court decision in *Khuja (formerly PNM) v Times Newspapers Ltd*,<sup>2</sup> and by focusing upon privacy law, it will be argued that the critical question for the law to determine is not whether such reporting is harmful but whether it amounts to (or would amount to) wrongdoing. Only in those circumstances can it be said that publication would be an actionable misuse of private information (the “misuse claim”). To establish this point, it will be said, in the following section, that open justice amounts to a constitutional principle of the highest order. With that in mind, it will be argued, in section three, that, where open justice is at stake, there can be no presumptive equality between the right to privacy and the right to free speech, as is usually the case in misuse claims; there is a clear presumption that open justice will be protected. In section four, it will be argued that the balancing act, which determines misuse claims, must be modified so that the claim cannot succeed unless publication amounts to (or would amount to) wrongdoing. This novel framework explains the decision in *Khuja*, and others, and gives better normative shape to future decision-making in the area.

## 2. OPEN JUSTICE

The principle of open justice can be put simply: justice demands transparency in the use of official power. Bentham said it best: ‘Publicity is the very soul of justice’.<sup>3</sup> It plays a vital role in the rule of law. Publicity informs citizens of the law, as applied by the judiciary, so that they may moderate their behaviour accordingly.<sup>4</sup> It informs them of their societal

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<sup>1</sup> For general discussion, see Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (OUP, 2006), 167-197; Eric Barendt, Jason Bosland, Rachael Craufurd-Smith & Lesley Hitchens, *Media Law: Text, Cases & Materials* (Pearson, 2014), 603-646; Helen Fenwick et al, *Fenwick on Civil Liberties and Human Rights* (Routledge, 2017, 5<sup>th</sup> edn), 352-363.

<sup>2</sup> [2017] UKSC 49.

<sup>3</sup> *The Works of Jeremy Bentham*, vol 4, (Edinburgh: William Tait, 1838-1843), 316. Lord Shaw refers to these passages in his judgment in *Scott v Scott* (1913) AC 417, 477, discussed below.

<sup>4</sup> See, Lon L Fuller, *The Morality of Law*, (Yale University Press, 1969, 2<sup>nd</sup> edn.), 33-94.

obligations and the penalties arising from breach of those obligations.<sup>5</sup> As Bingham notes, this is important not only for day to day life but also in commerce.<sup>6</sup> On the latter, he says ‘no one would choose to do business, perhaps involving large sums of money, in a country where the parties’ rights and obligations were vague or undecided’.<sup>7</sup> Equally, as Bentham also tells us, publicity guards against improbity: ‘it keeps the judge himself while trying under trial’.<sup>8</sup> In this way, as the House of Lords has previously recognised, open justice is a ‘safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice’.<sup>9</sup> Likewise, it performs a pivotal role in ensuring there is equality before the law. By knowing the identity of the parties to the claim, and the witnesses, we may be assured that the power, wealth or fame of those involved does not afford them special privileges. As Bingham also put it: ‘there should not be one law for the rich and another for the poor’.<sup>10</sup> Open justice also guards against retrospectivity and inconsistency: it allows the public to monitor the promise that, in Hayek’s words, ‘government in all its actions is bound by rules fixed and announced beforehand’.<sup>11</sup> This, Raz argues, includes observance of not just the courts but also the crime-preventing agencies (to ensure their ‘discretion...[is] not allowed to pervert the law’).<sup>12</sup>

For these reasons, the open justice principle applies equally to the publication of the proceedings themselves as it does to evidence communicated to the court, at least in criminal proceedings.<sup>13</sup> In this way, the public can be assured that the evidence presented to the court has been treated in the proper way, according to the law. If this were not the case then, as the House of Lords recognised in *Scott v Scott*,<sup>14</sup> decisions at first instance would be unassailable:

‘if perpetual silence were enjoined upon every one touching what takes place at a hearing in camera [ie, in private], the conduct and action of the judge at trial, his rulings, directions, or decisions on questions of law or fact, could never be reviewed in a Court of Appeal at the instance of a party aggrieved, unless indeed upon the terms that the party should consent to become a criminal and render himself liable to be fined and imprisoned for criminal contempt of Court, a serious invasion of the rights of the subject’<sup>15</sup>

Thus, the administration of justice relies upon accurate and fair accounts of proceedings.

For these reasons, it may be said that open justice consists of both an internal and external dynamic. Internally, the parties involved in the proceedings – either the person prosecuted or the parties to civil litigation – can be assured that they have received a fair hearing; a right which is guaranteed under Article 6 of the European Convention on Human Rights (“ECHR”). Externally, the general public can be assured that the probity of the

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<sup>5</sup> The Collected Works of F.A. Hayek, Vol II: The Road to Serfdom, Bruce Campbell, ed (University of Chicago Press, 2007), 112-113.

<sup>6</sup> Tom Bingham, *The Rule of Law*, (Penguin Books, 2011), 37-38.

<sup>7</sup> *Ibid*, 38.

<sup>8</sup> N 3. See discussion in Michael Tugendhat, *Liberty Intact* (OUP, 2017), 202-208.

<sup>9</sup> Per Lord Diplock, *AG v Levenson Magazine* [1979] AC 440, 450.

<sup>10</sup> Bingham, n 6, 55.

<sup>11</sup> N 5.

<sup>12</sup> Joseph Raz, *The Authority of the Law* (OUP, 1979), 218.

<sup>13</sup> *AG v Levenson Magazine*, n 9, 450.

<sup>14</sup> N 3.

<sup>15</sup> *Ibid*, 463-464.

judiciary and other public agencies (such as the police) are monitored and that the principle of equality before the law is maintained. This last point is achieved by the public naming of the parties and witnesses involved in the case. Where those individuals are not named, there is a risk that these guarantees are jeopardised. For one thing, we cannot know for sure that they have been treated as others would be. Additionally, and significantly, if the parties or witnesses are not named then justice may be disserved by the prevention of new or further evidence coming to light about those individuals or, alternatively, the absence of any such evidence arising may be given proper significance.<sup>16</sup> The importance of this was made plain recently when the press reported that (now disgraced) former TV presenter Stuart Hall had been arrested for non-recent sexual offences against three victims. This prompted a further ten victims to make complaints, adding to the overwhelming evidence against him.<sup>17</sup>

In this way, both the internal and external elements of open justice are underpinned by the right to freedom of expression under Article 10, ECHR. As Lord Steyn recognised in *Ex parte Simms*, free speech acts ‘as a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.’<sup>18</sup> In *ex parte Simms*, free speech served the internal dynamic by allowing the prisoners to ‘challenge the safety of their convictions’.<sup>19</sup> The external dynamic (as well as the internal) is achieved through public dissemination of judgments and knowledge of the evidence presented to the court. In the UK, this is done either by the court itself (eg, the Supreme Court does this) or by the Incorporated Council of Law Reporting, which publishes the decisions of superior and appellate courts in England and Wales. It is also achieved by the commercial press reporting on cases. In this way, the public’s right to know is parasitic on the press’s right to report freely. As Baker argues, the public reporting of criminal trials by the press is the paradigm example of a right to receive information about state action.<sup>20</sup> This has been recognised by the courts. For example, the European Court of Human Rights has said:

‘whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.’<sup>21</sup>

Thus, the public’s legitimate interest in the administration of justice adds weight to the strength of the free speech right at stake should the court seek to curtail open justice.

The significance of the open justice principle is also recognised in the academic literature. Institutional openness is a feature of the Rawlsian social contract.<sup>22</sup> This includes the opportunity to know, and critique, the workings of not only the judicial system but also the agents of public power, especially the police. As Hayek warns, this sort of transparency is a vital distinction between the liberal and totalitarian state. As he argues, it is important

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<sup>16</sup> N 2, [32]

<sup>17</sup> Attorney General's Reference (No. 38 of 2013) (*R v James Stuart Hall*) [2013] EWCA Crim 1450, [65]

<sup>18</sup> *R v Secretary of State for the Home Department, ex parte Simms* [1999] 2 AC 115, 126

<sup>19</sup> *Ibid*, 127.

<sup>20</sup> C Edwin Baker, *Human Liberty and Freedom of Speech* (OUP, 1989), 68.

<sup>21</sup> *Sunday Times v UK* (1979-80) 2 EHRR 245, [65].

<sup>22</sup> John Rawls, *A Theory of Justice* (OUP, 1999, revised edn), 47-52.

that state institutions do not seek to pre-determine the worth of this information (ie, a report of legal proceedings) since intellectual freedom is recognised by its capacity to make innovative leaps and is valued for its capacity to criticise state power so as to advance social progress.<sup>23</sup> In other words, the state should not determine what citizens need to know; only citizens themselves can make this judgement, through critical discernment. These lofty ideals are realised through the functional work of open justice which, as Robertson reports, ‘enhances public knowledge and appreciation of the workings of the law, ...assists the deterrent function of criminal trials and... permits the revelation of matters of genuine public interest’.<sup>24</sup>

It follows that the open justice principle is not absolute. It may be restricted where it is necessary to do so. But it is important to note that these circumstances must be exceptional if the sanctity of the open justice principle is to be maintained. In doing so the court must have regard not only to the specifics of the case before them but also the general effect that any curtailment gives rise to. This point is particularly well stated in *Scott v Scott* when Lord Shaw recognised ‘the gradual invasion and undermining of constitutional security’ through the ready use of exceptions.<sup>25</sup> He expounded this point by alluding to the risk of (a sort of) despotism resulting from ready use of discretion:

‘there is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves. I must say frankly that I think these encroachments have taken place by way of judicial procedure in such a way as, insensibly at first, but now culminating in this decision most sensibly, to impair the rights, safety, and freedom of the citizen and the open administration of law’.<sup>26</sup>

Lord Woolf also recognised this importance in the Court of Appeal decision in *ex parte Kaim Todner* in which he emphasised the danger of undermining the general principle through the accretion of exceptions from analogy.<sup>27</sup>

In *Scott v Scott*, the House of Lords was adamant that exceptions should arise only in limited circumstances and, even then, only when it could be said that the proper administration of justice would be served by exercise of the discretion. In Viscount Haldane LC’s opinion, this was restricted to cases involving ‘the ward or the lunatic’ and cases where the effect of publicity would be ‘to destroy the subject-matter’ of the action (eg, certain breach of confidence claims).<sup>28</sup> Thus, the exceptions speak to ‘a yet more fundamental principle that the chief object of the Courts of justice must be to secure that justice is done’.<sup>29</sup> Lord Halsbury echoed this concern and noted that the exception ‘where justice may not be done’ should not be understood more broadly than Haldane intended.<sup>30</sup> Lord Loreburn also emphasised that ‘if the Court is satisfied that to insist upon publicity would in the circumstances reasonably deter a party from seeking redress, or interfere with the effective trial of the cause’ then restriction is justifiable.

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<sup>23</sup> Hayek, n 5, 69-70; 178-180.

<sup>24</sup> Geoffrey Robertson QC, *Freedom, the Individual and the Law* (Penguin Books, 1991, 6<sup>th</sup> edn), 279.

<sup>25</sup> N 3, 478.

<sup>26</sup> *Ibid*, 477-478.

<sup>27</sup> *R v Legal Aid Board ex parte Kaim Todner* [1999] QB 966, 977

<sup>28</sup> N 3, 437.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid*, 442-443.

### 3. PRIVACY & OPEN JUSTICE

So far, the discussion has focused upon court proceedings themselves. There is the related issue of how the press reports arrests. This is a perennial issue, though one attracting greater publicity in light of Operation Yewtree: the police investigation into non-recent allegations of sexual offences by Jimmy Savile, on his own and with others, and non-recent allegations of sexual offences conducted by others unconnected to him.<sup>31</sup> There have been a number of high profile arrests in which the arrestee has been named without being formerly charged or prosecuted. In some cases, this has resulted in litigation against the police, including Sir Cliff Richard's privacy lawsuit against the BBC and the Chief Constable of South Yorkshire police. His property was raided, in circumstances of considerable publicity, by police investigating historic sexual abuse (although this was not an operation Yewtree case).<sup>32</sup> In a later newspaper article, Geoffrey Robertson QC derided the incident as 'unacceptable'.<sup>33</sup> Others have been prosecuted but have been acquitted, both as part of Operation Yewtree and outside of it. This includes Michael Le Vell, an actor from the long-running TV soap opera, *Coronation Street*. After his acquittal, following what his friend described as 'two years of hell',<sup>34</sup> TV presenter Phillip Schofield tweeted: 'It's bloody ridiculous a mans [sic] life & reputation can be so comprehensively trashed in this way.'

These examples show how the administration of justice can generate conflict with the right to reputation and to a private and family life under Article 8, ECHR. It is understandable that arrestees should complain that the fact of arrest has tarnished their reputation and damaged their home life by throwing unwarranted suspicion upon their character. This is especially aggrieving if, as with Sir Cliff Richard, it is several years between, in his case, the highly-publicised raid on his property and the quiet admission that no charges would be brought against him. This sort of concern was central to the recent High Court decision in *ERY v Associated Newspapers Ltd*.<sup>35</sup> The Mail on Sunday had learned that Company A, the claimant's company, and Company B (which had a business relationship with A) had been raided by police investigating alleged financial crime. This event had been reported by the local press. The Defendant wished to publish an article about this event, which would acknowledge no one had yet been charged with any offence (and, in fact, it did publish such an article on the MailOnline). A follow-up story was published after several people were arrested, further to the raid, although it appears these people were not connected to Company A. Meanwhile, the claimant had been interviewed under caution by the police as part of an investigation into his suspected involvement with financial crime. After the claimant sought an injunction to prevent publication of this information, the defendant

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<sup>31</sup> See David Gray and Peter Watt, *Giving Victims a Voice: A joint MPS and NSPCC report into allegations of sexual abuse made against Jimmy Savile under Operation Yewtree*, January 2013  
<https://www.nspcc.org.uk/globalassets/documents/research-reports/yewtree-report-giving-victims-voice-jimmy-savile.pdf>

<sup>32</sup> The claim against South Yorkshire Police has since been settled *Richard v BBC & South Yorkshire Police* [2017] EWHC 1648 (Ch).

<sup>33</sup> Geoffrey Robertson QC, 'The way the police have treated Cliff Richard is completely unacceptable', *The Independent*, 16 August 2014.

<sup>34</sup> <http://www.bbc.co.uk/news/uk-england-manchester-24032449>.

<sup>35</sup> [2016] EWHC 2760 (QB).

undertook not to publish it without giving notice (of not less than 24 hours). The claimant was successful, for reasons that deserve our attention.

The claimant claimed that publication would be a misuse of private information. As is well-established, the test for this tort, at interim relief proceedings, requires the court to be satisfied that the claimant is ‘more likely than not’ to succeed at full trial.<sup>36</sup> To do so, the claimant must establish that the invasion of privacy, under Article 8, ECHR, would be of greater magnitude than the interference with freedom of expression, under Article 10, ECHR. The court in *ERY* found that there was ‘no real risk’ that the fact of the claimant’s interview under caution would be published given the defendant’s undertaking not to do so without at least 24 hours’ notice.<sup>37</sup> But it recognised the claimant’s ‘more general concern’ that the defendant may imply suspicion of the claimant’s involvement with financial crime.<sup>38</sup> Arguably, in its decision to grant an injunction to the claimant, the court, in its handling of the balancing act, fell into error in two ways: (1) by misstating the defendant’s obligations to the claimant under Art 8 and (2) by failing to acknowledge the public interest in press reports of police activity.

As to the former, the court held that the claimant had ‘a reasonable expectation of privacy in the information that he is being investigated by the police’.<sup>39</sup> It did so by reference to paragraph 3.5.2 of the Guidance on Relationships with the Media issued by the College of Policing, which states, amongst other things, that the identity of those arrested or suspected of crime should not be realised to the press or public, save in limited circumstances. The court also referred to Lord Justice Leveson’s statement to the same effect in his report on press ethics. It further noted that the Data Protection Act 1998 (“DPA”) also defines the commission or alleged commission of a crime as sensitive personal data.<sup>40</sup>

The court, though, recognised that the DPA was irrelevant since (a) it had not been pleaded and (b) the special exemption for the media ‘would, no doubt, be invoked’ even if it was. But the reliance on both the College of Policing guidance and Leveson LJ’s statement cannot support the position reached by the court. First, Leveson LJ’s statement is in no way a proposition of law; it is a recommendation from a public inquiry. Secondly, the obligations imposed on the police are not the same as those imposed on the press. The police are a public authority who, under s 6 of the Human Rights Act 1998 (“HRA”), must act compatibly with the ECHR. They must, therefore, take into account a suspect’s Article 8 (and Article 6) rights when deciding whether or not to name them. But the press is not a public authority and does not fall under s 6. It owes no such obligations to the claimant. It is wrong, therefore, to equate the two. The claim that the claimant would have against the police, if they were to name him, is not of the same magnitude as it is against the press. If the police had disclosed this information (we are told they did not)<sup>41</sup> then the misuse claim would be strengthened by the fact of disclosure, but only as against the police; the press has no such obligation to the claimant. The court might have had regard to the claimant’s claim that publication would jeopardise his health and disrupt the life of his child (albeit with the reservations set out

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<sup>36</sup> S 12(3) Human Rights Act 1998, as determined by *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253.

<sup>37</sup> N 35, [55].

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, [65].

<sup>40</sup> See, *ibid.*, [56]-[62].

<sup>41</sup> *Ibid.*, [39].

below) – but, curiously, the court stated it had reached its decision without regard to such interests.<sup>42</sup>

As to the latter point (above), concerning the defendant’s Art 10 rights, the courts treatment of that, for the purposes of balancing, is unpersuasive. The defendant had pleaded that the story concerned a matter of public interest. The court concluded that the injunction, though, would not prevent the defendant publishing the investigation into Company A. In doing so, it accepted, or seemed to, that there was no public interest in reporting that the claimant was being investigated by the police or, alternatively, (though this is not stated in the judgment) that the public interest in this information was outweighed by the strength of the privacy claim. The court was satisfied that the order suppressing this information could be discharged or varied on 24 hours’ notice to the claimant, though only if there was a ‘significant change of circumstances’ in the status of the police investigation.<sup>43</sup>

This reasoning seems arbitrary. If there is a public interest in reporting the police investigation into the company, then why not also the claimant? In reporting such matters, the press must, of course, take care not to cause a substantial risk of seriously prejudicing future proceedings, but that was not a live issue here (or, if it was, it was not mentioned). It should be recognised that the Supreme Court has previously held that where public interest expression is at stake, the circumstances in which an injunction may be granted to prevent publication are very narrow.<sup>44</sup>

Perhaps it may be said that *ERY v Associated Newspapers Ltd* is not an open justice case. That view, though, would restrict the administration of justice to legal proceedings. Yet if we understand open justice as concerned with the exercise of public power, the actions of the police must form part of the definition. The same issues apply. The question of how the police act, who they arrest, how they treat the powerful and wealthy, as compared to the ordinary man, are all questions about the use of official power. That they happen outside the court room should make no difference to the application of the principle. There will be circumstances where an arrest ought to be kept secret (for example, in the case of organised crime, where the arrest of one member may prompt others to go to ground) but these will be exceptional.

The judicial treatment of open justice in misuse claims may be criticised at a broader level. Ordinarily, in misuse claims, neither Article 10 nor Article 8 is treated as having presumptive priority. This was made clear by the House of Lords in *Campbell v MGN Ltd*<sup>45</sup> and, subsequently, in *Re S*,<sup>46</sup> where it was stated ‘neither article has as such precedence over the other’.<sup>47</sup> In an open justice case, though, as *Re S* was, this claim seems indefensible. In *Scott v Scott*, open justice is shown to be a constitutional principle of the highest order. Viscount Haldane LC emphasised it is ‘of much public importance’.<sup>48</sup> Lord Atkinson said it was ‘of vast importance’.<sup>49</sup> Lord Shaw described it as ‘a sound and very sacred part of the

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<sup>42</sup> Ibid, [72 (v)].

<sup>43</sup> Ibid, [74].

<sup>44</sup> In *Re Guardian News and Media Ltd* [2010] UKSC 1.

<sup>45</sup> [2004] AC 457. See, eg, Baroness Hale’s judgment, [138]: ‘The parties agree that neither right takes precedence over the other’.

<sup>46</sup> [2004] UKHL 47

<sup>47</sup> Ibid, [17].

<sup>48</sup> *Scott v Scott*, n 3, 434

<sup>49</sup> Ibid, 449.



constitution'.<sup>50</sup> Lord Loreburn called it a 'priceless inheritance'.<sup>51</sup> This special treatment can be seen in other cases. It has been said that 'it is impossible to over emphasise the importance to be attached to the ability of the media to report criminal trials. In simple terms this represents the embodiment of the principle of open justice in a free country'.<sup>52</sup> It is also plain that the open justice principle and freedom of expression are inseparable: as the Court of Appeal has also said open justice is 'buttressed' by Art 10.<sup>53</sup> Even in *Re S*, the court recognised that 'the ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in a criminal court'.<sup>54</sup> In this way, it may be said that open justice is parasitic on freedom of speech. It depends upon publicity to be realised. Once this is understood, the right to freedom of speech takes on a different character and becomes of higher value than competing rights. Professor Barendt has been critical of the apparent weakening of the presumptive equality rule that sort of reasoning entails, which he identifies in other cases.<sup>55</sup> But in light of these statements by the court, it is hard to see why Art 8 should be thought presumptively equivalent. Moreover, the subordination of the open justice principle to the level of individual privacy, even in principle, brings the judiciary under suspicion. As Smolla has argued '[a] society that wishes to take openness seriously as a value must ...devise rules that are deliberately tilted in favour of openness in order to counteract the inherent proclivity of governments to engage in control, censorship and secrecy'.<sup>56</sup> This places the court in an invidious position; since it is in its own interests to shade its reasoning from public scrutiny, censorship, even in part, of its judgment must occur exceptionally. It cannot be the case, therefore, that the court is as indifferent to open justice as it is between individual rights; the former must be (and is) its priority. This does not mean that the administration of justice cannot be served by interferences with open justice. Clearly, there are circumstances in which individual rights take priority. But given that, as will be shown, the circumstances in which open justice may be interfered with are narrower than the circumstances in which privacy may be interfered with; there can be no equivalency between the two.

One elegant solution to this problem would be for the court to hold that no reasonable expectation of privacy arises in an open justice misuse case. In this way, the principle of no presumptive priority would remain undisturbed. The court would be saying, in effect, that no privacy interests arise so that there would be no need to consider which of the two rights – privacy or free speech – was of greater significance on the facts. This, though, would be an unsatisfactory treatment of the problem. Where there is no reasonable expectation of privacy, the claim ends – without any analysis of the free speech at stake.<sup>57</sup> This, though, does not capture the issues. It is not that there can be no prima facie privacy case where open justice is at stake; but, rather, that there is no claim where freedom of expression is not misused. Therefore, there must be an analysis of the speech claim before a decision is reached. This

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<sup>50</sup> *Ibid*, 473.

<sup>51</sup> *Ibid*, 447.

<sup>52</sup> *R (on the application of Trinity Mirror Plc) v Croydon Crown Court* [2008] QB 770, [32].

<sup>53</sup> *R v. J* [2003] EWCA Crim 3268, [2].

<sup>54</sup> N 46, [18].

<sup>55</sup> Eric Barendt, 'Happy Centenary Birthday to *Scott v Scott*' (2013) 5(2) *Journal of Media Law* 297, 304.

<sup>56</sup> Rodney A Smolla, *Free Speech in an Open Society* (Vintage Books, 1992), 4-5.

<sup>57</sup> See *John v Associated Newspapers Ltd* [2006] EWHC 1611.

means that there must be engagement with the second part (the ‘balancing act’) of the Campbell test.

#### 4. STRIKING THE BALANCE: MISUSE DISTINGUISHED FROM HARM

If (it is accepted that) there is no presumptive priority for Art 8 in a misuse of private information claim involving open justice, then how is the court to strike the balance between the two claims? It will be argued in this section that the parallel exercise, in which both rights are examined, must be different to other misuse claims because of the strong constitutional presumption in favour of Article 10 protection. The question of harm plays an important part in this analysis. But, crucially, the presence of harm is not determinative. Specifically, as will be argued, the question for the court is not whether interference with open justice is necessary to avoid serious harm to the claimant, but to identify whether the harm to the claimant results from a misuse of the open justice principle. In this way, it is not the existence but the cause of the harm that is most important to deciding the case.

This can be shown by considering the minority judgments in the Supreme Court case of *Khuja* (previously *PNM*) v *Times Newspapers Ltd.*<sup>58</sup> The claimant was referred to by name in a criminal case at the Old Bailey. He obtained an injunction preventing his identity from being published in newspaper reports about the proceedings. The case involved a matter of serious public concern. At the time, the claimant was on bail following arrest. The injunction was granted on the basis that identification might seriously prejudice his right to a fair trial, should later proceedings arise against him. After his de-arrest, though, the newspapers sought discharge of the injunction. The claimant resisted by claiming publication of his arrest on suspicion of sexual offences against children would undermine his right to respect for his private and family life (as well as damaging his reputation). The Supreme Court agreed with the court of first instance that the principle of open justice trumped the claimant’s Art 8 rights. Lord Kerr and Lord Wilson disagreed. They claimed the majority had fallen into error by not recognising the harm caused to the claimant. In their judgment, the majority, and the courts below, had been wrong to conclude that the general public understands that a person is innocent until proven guilty. This, they said, was a legal presumption with no standing in reality.<sup>59</sup> This assumption led to error because it meant the balancing act, conducted by the court, had failed to take into account ‘the risk of profound harm to the reputational, social, emotional and even physical aspects of his private and family life’.<sup>60</sup> In their view, the Art 8 claim ought to have succeeded.

But this reasoning is wrong. It assumes that the existence of harm is determinative to the claim. This is not what the case law says. In *Scott v Scott*, as the majority in *Khuja* acknowledged,<sup>61</sup> it was accepted that realisation of the open justice principle may cause harm to persons involved in the case. Lord Atkinson put this most explicitly:

‘The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in

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<sup>58</sup> N 2.

<sup>59</sup> *Ibid*, [47].

<sup>60</sup> *Ibid*, [58].

<sup>61</sup> *Ibid*, [12].

public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.<sup>62</sup>

This has been restated more recently (though prior to the HRA era) by Hoffmann LJ (as he then was):

‘Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom.’<sup>63</sup>

Lord Kerr’s and Lord Wilson’s position is also unsupported by philosophical argument. Liberal tradition treats harm as a necessary but not sufficient reason to interfere with liberty.<sup>64</sup> As John Stuart Mill argued,<sup>65</sup> there are all manner of harmful circumstances that do not automatically warrant state intervention. To his examples may be included unrequited love, adultery, dismissal, competition, redundancy, house repossession, poverty, humiliation. To the extent these instances are litigable, the law requires evidence of wrongdoing. This is where Lords Kerr and Wilson fell into error. Their minority judgment is devoted to showing how Khuja’s connection with the criminal case would do him great harm. What they do not show, though, is how a fair and accurate report of court proceeding would amount to a misuse of private information causing harm.

Before turning to what they ought to have done, let us consider the facts of *Scott v Scott* to be assured that harm of itself is not misuse. Of course, *Scott v Scott* is not a misuse of private information case. But it is a proto-privacy claim. It concerned divorce proceedings that had been held in private. The subject matter of these proceedings was delicate. The petitioner obtained evidence confirming she was a virgin. She alleged the respondent was impotent. He denied this but subsequently withdrew that claim. After the decree nisi was issued, the respondent intimated to others that the divorce proceedings resulted from his ex-wife being of unsound mind. She dispatched a transcript of proceedings to her ex-husband’s father, sister and an unnamed third person to prove otherwise. The question for the court was whether this constituted an actionable contempt of court. As noted above, the House of Lords accepted that this information would cause harm to the respondent’s reputation (and, we may add, family life, albeit that phrase is not used). But that was not sufficient to disapply the open justice principle.

Clearly, *Scott v Scott* should not be viewed anachronistically. There is no suggestion that a right to privacy is at work in that case – and, of course, the ECHR did not exist then.

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<sup>62</sup> N 3, 463.

<sup>63</sup> *R. v Central Independent Television Plc* [1994] Fam. 192, 202-203.

<sup>64</sup> This is the much neglected second part of John Stuart Mill’s harm principle, from *On Liberty* in *The Collected Works of John Stuart Mill*, JM Robson ed, vol XVIII, (University of Toronto Press, 1977), 213-310. The first part is well-known: ‘...the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others’ (223). The second part is: ‘if any one does an act hurtful to others, there is a prima facie case for punishing him, by law, or, where legal principles are not safely applicable, by general disapprobation’ (224). There is a rich irony in this second part being so commonly neglected given Mill’s own view that without constant discussion the grounds of an opinion are too easily forgotten and become a ‘dead dogma, not a living truth’ (247).

<sup>65</sup> See Chapter V, ‘Applications’, 292-310, in which Mill seeks to demonstrate that harm alone, either to the self or to others, does not justify interference.

But it reinforces the idea that the common law responds to wrongdoing and not simply harm. This is very clear from the majority decision in *Khuja*. Lord Sumption, with whom Lord Neuberger, Lady Hale, Lord Clarke and Lord Reed agreed, found that ‘the present appeal must be approached on the footing that there is a real risk that a person knowing of these matters would conclude that PNM [*Khuja*] had sexually abused the complainant notwithstanding that he had never been charged with any offence’.<sup>66</sup>

If harm is not the determinative factor, when should the right to freedom of expression give way to a privacy (or any other competing rights) claim? As noted above, the misuse of private information tort claim requires the court to balance the strength of the two respective claims. But, following *Khuja* and in light of *Scott v Scott*, it seems unsafe to assume that the test in *Campbell* (which was not an open justice claim) maps neatly onto an open justice case since the two rights cannot be said to be presumptively equal. In this way, it can be argued that the House of Lords in *Re S* fell into error by assuming that it could.

Whilst the ultimate test is (as it must be doctrinally and ought to be normatively) whether the strength of the privacy claim is outweighed by the strength of the free speech claim,

a gloss is required on how this balancing act is realised. In *Khuja*, as in *Scott v Scott*, the Supreme Court maintained that an exception to open justice is permissible only where statute allows it or where the administration of justice requires it.<sup>67</sup> But, as Viscount Haldane LC made clear in *Scott v Scott*, the latter exception turns ‘not on convenience, but on necessity’.<sup>68</sup> This should require the court to examine the source of the ‘harm’ and the possibility of remedial action. As is plain, in *Khuja*, the source is the prospective response of the wider audience to Mr *Khuja*. His family, his friends, his colleagues, his business associates and the wider public may think him guilty of a crime he has not committed. We can imagine these as circles within circles representing a community separated in its proximity to Mr *Khuja* and, so, divided in his power to address them. Mr Justice Tugendhat addressed the prospective impact of an injunction (in *Khuja*’s favour) on what we might call the inner circle (ie, that group of people most closely connected to him):

‘some knowledge of what had been said about him at the trial would spread among those who knew him personally or by name, so that restrictions on press reporting would be of little if any benefit to him or his family. Indeed, the prohibition of media reporting might lead to the circulation of ill-informed or misleading versions of what was said that would aggravate PNM’s situation’.<sup>69</sup>

He might have added that Mr *Khuja* can address this circle directly, including any misgivings they might have about his involvement. He would be most able to press home the advantage of his complete vindication in the eyes of the law. Similarly, Mr *Khuja* could also have discussions with his colleagues, business associates and customers/clients (the second circle) to ensure they knew of his innocence. It may be assumed that these interactions would not be as intense, unguarded or intimate as a conversation with friends and family, but he would at least have the capacity to address these individuals directly if he wished. In the remaining, third circle, we might include everyone else, specifically those who do not know Mr *Khuja* or only know of him through his involvement with these criminal proceedings. Apart from

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<sup>66</sup> N 2, [8].

<sup>67</sup> See *Khuja*, n 2, [14]; *Scott v Scott*, n 3, 437-438.

<sup>68</sup> *Scott v Scott*, *ibid*, 438.

<sup>69</sup> *Khuja*, n 2, [32].

public statements, Mr Khuja may have no way of addressing his innocence with these individuals. But he could have recourse to the law if these individuals – or those from the first and second group – were to defame him, harass him or otherwise invade his privacy due to his involvement in the criminal proceedings.

These considerations speak to the question of necessity. Since Mr Khuja can, in the first place, address concerns amongst his personal and professional ties and, otherwise, may have recourse to the law to protect his reputation and private life, it cannot be said that an injunction would be the only means by which to safeguard justice. It may not even be said that an injunction would be the best means given the opportunity for misinformation that Tugendhat J refers to. Perhaps some might say that this position would not serve justice; that preventing prospective damage to Mr Khuja's privacy or family life would be more just than compensation after the event. This, though, would be to ignore the law's position that damages are the primary remedy in privacy and defamation proceedings and are an adequate remedy.<sup>70</sup> As Dr Scott has argued:

'No one would argue that monetary compensation for the loss of an eye can restore sight to the victim... Nevertheless, assuming that they were awarded at a sufficiently high level, damages would be generally understood to be fair and just satisfaction, and hence an effective remedy.'<sup>71</sup>

Admittedly, as Dr Hughes argues in response, the two scenarios 'are different in many ways' but chiefly because 'there is no opportunity for the law to intervene to prevent the physical injury that Scott describes'.<sup>72</sup> But, in an open justice case, Dr Scott's view has value. The wrong is not done by revealing the information that X was a party to legal proceedings or a material witness. The wrong is done by the assumptions – and, to be clear, misassumptions – that arise from the reader contriving to insert additional details to this bald statement. So, whereas, in a case like *Mosley v News Group Newspapers Ltd*,<sup>73</sup> the harm to the claimant arises from publication of the information itself that reveals, in great detail, features of the claimant's personal life, that is not the case where legal proceedings are reported accurately. In other words, the personal injury claim becomes comparable because, as Hughes observes, it would be a terrible imposition on liberty 'to require legal authorisation' for an individual's proposed 'course of conduct'.<sup>74</sup> This brings to our attention the question of wrongdoing. Since the press has a right to provide fair and accurate reporting of legal proceedings it cannot be said to have committed a wrong by doing so. The wrongdoing is done by the person who takes this information and either adds false information to it – or uses that information to harass, etc, the subject. In other words, the audience becomes the prospective stone-thrower. If, as with the stone-thrower, there is no opportunity to intervene before that event then damages following lawsuit is the only means of providing redress.

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<sup>70</sup> See *Terry v Persons Unknown* [2010] EWHC 119, [127] & [129]. More generally, see, eg, *American Cyanamid Co v Ethicon Ltd* [1975] 2 WLR 316, 323; *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1996] 3 WLR 27; *Coventry v Lawrence* [2014] UKSC 46, [2014] 2 P & CR 19.

<sup>71</sup> Andrew Scott, 'Prior Notification in Privacy Cases: A Reply to Professor Phillipson' (2010) 2(1) *Journal of Media Law* 49, 56.

<sup>72</sup> Kirsty Hughes, 'Privacy Injunctions: No Obligation to Notify Pre-Publication' (2011) 3(2) *Journal of Media Law* 179, 186.

<sup>73</sup> [2008] EWHC 1777.

<sup>74</sup> N 72.

This focus on wrongdoing explains the nature of the exceptions to the open justice principle. The Supreme Court in *Khuja* identified these as set by the law of contempt, the law of defamation and the law protecting Convention rights.<sup>75</sup> In contempt, the exceptions speak to, for example, the risk of prejudicing legal proceedings by deterring victims or witness from participating in, or by undermining the prospects of, a fair trial; or the extra protection that children and vulnerable groups receive from public intrusion (eg, victims of sexual offences); or, as in certain breach of confidence and misuse of private information claims, that revealing the information would destroy the purpose of proceedings. In defamation, injunctions may only be granted in rare cases, according to the rule in *Bonnard v Perryman*,<sup>76</sup> where, as the court put it in *Greene v Associated Newspapers Ltd* ‘it is clear that no defence will succeed at trial’.<sup>77</sup> This lends itself to the claim that the wrongdoing must be particularly severe to justify interim relief.

This approach should be followed for Art 8. The court should be satisfied (1) of wrongdoing and (2) that that wrongdoing could only be addressed through the issuance of interim relief or an order for anonymity. This interpretation may be read into the Supreme Court’s assessment, in *Khuja*, of the Art 8 cases involving open justice, albeit they might have expressed the significance of wrongdoing more explicitly.<sup>78</sup> This quality is an important qualifier to the statement in *Scott v Scott* that the ‘exceptions [to the open justice rule] are themselves the outcome of a yet more fundamental principle that the chief object of Courts of Justice must be to secure that justice is done’.<sup>79</sup> But the thin concept of ‘justice’ and its antonym must be handled carefully. It cannot be that harm to a party’s autonomy and/or dignity is sufficient to meet this standard since the facts of *Scott v Scott* clearly point away from that conclusion. The necessity of ‘wrongdoing’ is important because otherwise, as in a case like *Khuja*, a passionate plea could be made that to permit him to be named is to do him a gross injustice since, as the Supreme Court recognises, the broader audience (that third group of people mentioned above) may well form the wrong impression that there is ‘no smoke without fire’. But to protect his right to respect to a private and family life, in these circumstances, would be to exaggerate the right and treat it as absolute. It would be to say that the risk of wrongdoing in others, not the speaker itself, justifies interference with the right to freedom of expression. In this way, it would be to prioritise Art 8 concerns in open justice cases and so invert the priority of the rights, as set out above.

This can be shown by considering how the court treats Art 2, the right to life, and Art 3, the prohibition on torture, which are absolute rights. In *Venables v News Group Newspapers Ltd*,<sup>80</sup> the court accepted evidence that the threat of murder or serious physical harm against child-killer Jon Venables and Robert Thompson were of sufficient weight to justify interfering with the press’s right to publish any information about them that could lead to discovery of their whereabouts. It is worth setting out the court’s reasoning in full:

‘It is a very strong possibility, if not, indeed, a probability, that on the release of these two young men there will be great efforts to find where they will be living and, if that information becomes public, they will be pursued. Among the pursuers may well be those intent on revenge. The requirement in the

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<sup>75</sup> N 2, [14]-[30].

<sup>76</sup> [1891] 2 Ch 269.

<sup>77</sup> [2005] QB 972, [57].

<sup>78</sup> N 2, [20]-[30].

<sup>79</sup> N 3, 437.

<sup>80</sup> [2001] Fam 430.

Convention that there can be no derogation from the rights under articles 2 and 3 provides exceptional support for the strong and pressing social need that their confidentiality be protected.<sup>81</sup>

Set against this, is the court's consideration of the prospective Art 8 claim:

'I am uncertain, for instance, whether it would be appropriate to grant injunctions to restrict the press in this case if only article 8 were likely to be breached. Serious though the breach of the claimants' right to respect for family life and privacy would be, once the journalists and photographers discovered either of them, and despite the likely serious adverse effect on the efforts to rehabilitate them into society, it might not be sufficient to meet the importance of the preservation of the freedom of expression in article 10(1).'<sup>82</sup>

It does not matter that the facts of *Venables* and *Khuja* hardly bear comparison. The point is that in *Venables* it was understandable that freedom of expression should be restricted even though there would have been no wrongdoing by the press in reporting this information.<sup>83</sup> The serious risk to life and limb merited this exceptional treatment because Arts 2 and 3 are absolute rights (for these purposes).

Is this treatment unfair to, or otherwise dismissive of, the legitimate concern that Mr *Khuja's* private and family life, as well as his business dealings, are likely to be heavily disrupted by news of his involvement? Moreover, given the recognition that others may well consider him guilty despite his innocence, is there not a serious risk of damage to his mental well-being, which should have greater significance in the balancing act? These are important points. As Sir Richard Henriques recently noted, in his report on the Metropolitan Police Service's handling of cases involving alleged non-recent sexual offences,<sup>84</sup> arrests can cause 'the most dreadful unhappiness and distress to... suspects, their families, friends and supporters... A reputation... can be extinguished in an instant'. In his public statement prior to trial, Stuart Hall said: 'The last two months of my life have been a living nightmare. I've never gone through so much stress in my life, and I am finding it difficult to sustain. Fortunately, I have a very loving family and they are very supportive, and I think but for their love I might have been constrained to take my own life.'<sup>85</sup> Whether, in Hall's case, this was true or part of a deliberate ploy to manipulate the press<sup>86</sup> is irrelevant; it is possible to imagine that others in his situation (who are actually innocent) would feel this way.

It is important to note, though it is no answer, that 'the law expects the ordinary person to bear the mishaps of life with fortitude and... customary phlegm'.<sup>87</sup> The fact of arrest, even for serious crime, should not be taken to have a deleterious effect on mental

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<sup>81</sup> Ibid, [82].

<sup>82</sup> Ibid, [86].

<sup>83</sup> See *R v Central Criminal Court ex parte Crook* (1995) 1 WLR 139, 145, 'as a general proposition there is a strong and proper public interest in knowing the identity of those who have committed crimes, particularly serious and detestable crimes'.

<sup>84</sup> Sir Richard Henriques, *An Independent Review of the Metropolitan Police Service's handling of non-recent sexual offence investigations alleged against persons of public prominence*, 31 October 2016, [1.67]. The minority judgment in *Khuja*, n 2, places great emphasis on this effect.

<sup>85</sup> N 17, [66].

<sup>86</sup> The court treated this statement, in which he pleaded total innocence, as a 'deliberate falsehood' and a 'serious aggravating factor': 'The offender was an expert in the ways of the media. He was fully alert to the possible advantages of manipulating the media', *ibid*, [67]-[68].

<sup>87</sup> per Dillon LJ in *Khorasandjian v Bush* [1993] QB 727, 736.

health and personal relationships without proof of such. But, even where there is proof, it is doubtful that the court would treat such as sufficient to make an exception to the open justice principle. The Supreme Court decision in *O v Rhodes*<sup>88</sup> lends support to this analysis. This case concerned O, an eleven-year-old boy, living in the USA. His litigation friend, his mother (and, subsequently, his godfather), wished to prevent his father, the musician, James Rhodes, from publishing within his autobiography detailed accounts of childhood sexual abuse and the suicidal thoughts and self-harm resulting from it. She was concerned about the damaging psychological effect that such information would have on O. The court was furnished with medical opinion that said the contents of the book ‘would be devastating’ to O:

‘O does not have the ability to process this information in an acceptable way. The result is likely to be extreme confusion, agitation and anger which would lead to enduring emotional distress... The cumulative effect would lead to a poor prognosis in respect of his overall functioning and likely cause enduring psychological harm. In my professional opinion, exposure to this kind of material carries the risk of physical and emotional harm and is therefore abusive.’<sup>89</sup>

At the Supreme Court, it was further noted that O suffers from Asperger’s syndrome, attention deficit hyperactivity disorder, dyspraxia and dysgraphia, such that:

‘his psychological schemas are not malleable, he receives information in a literal way and is unable to conceptualise it in an alternative way, and he would view himself as responsible for some of his father’s distress and [as] an extension of his father. He is already prone to self-harm and emotional outbursts and these would probably increase’.<sup>90</sup>

This evidence clearly shows that the harm to O would be profound. For obvious reasons, the misuse claim failed at first instance and was not pursued in appeals: the information at stake was the father’s rather than the child’s (and therefore publication could not amount to a ‘misuse’). It is interesting though, that Bean J, at first instance, should note: ‘Even if the claimant did have some form of English law cause of action deriving from Article 8, in my judgment the balancing exercise would come down very firmly on the side of the father’s Article 10 rights. He wishes to tell the story of his own life.’<sup>91</sup> The appeal proceeded based on a claim for intentional infliction of emotional distress under *Wilkinson v Downton*.<sup>92</sup> The Supreme Court rejected that claim, for reasons that do not need addressing here. But, notice that the court did so even though the expression at stake was conceded to be harmful to O. In Baroness Hale and Lord Toulson’s joint judgment,<sup>93</sup> this effect was insufficient to justify the imposition of a tort that would restrict the right to freedom of expression. As they put it: ‘Freedom to report the truth is a basic right to which the law gives a very high level of protection’.<sup>94</sup> A case like this shows how formidable the right to freedom of expression is when it is at stake.

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<sup>88</sup> [2015] UKSC 32.

<sup>89</sup> From the first instance decision, *OPO v MLA* [2014] EWHC 2468 (QB), [5].

<sup>90</sup> N 88, [18].

<sup>91</sup> *Ibid*, [22].

<sup>92</sup> [1897] 2 QB 57.

<sup>93</sup> Interestingly, Lord Wilson was in agreement with this judgment (as was Lord Clarke) and that of Lord Neuberger.

<sup>94</sup> N 88, [77].



Perhaps some would argue that this analysis does not adhere to the proportionality principle, which requires the courts to interfere with rights in the least restrictive way.<sup>95</sup> For example, Rhodes could still have enjoyed his free speech rights without including the harmful passages and so could have preserved O's privacy interests. So too, the newspaper in ERY could have investigated company A without mentioning the claimant – and the newspaper in Khuja could have reported the criminal case without revealing Khuja's identity. But we miss the point of freedom of expression if we think it acceptable for judges to editorialise in this way; a point recognised by the Supreme Court in *O v Rhodes*<sup>96</sup> and *Khuja*.<sup>97</sup>

In dealing with this point, though, the judiciary may be criticised for an unnecessarily indulgent treatment of the free speech claim at stake. They have stressed that full reporting, including names, adds to the reader's experience ('readers will be less interested' without names)<sup>98</sup> and satisfies the commercial interests of the press ('ultimately, such an approach [ie, censorship] could threaten the viability of newspapers and magazines').<sup>99</sup> But these are irrelevant glosses. If these were the main reasons in favour of protecting freedom of expression, they would be extraordinarily weak and easily put aside. It is no concern of the judiciary, and no comfort to the named parties, that readers will take more satisfaction from their publication consequently or that the newspaper will continue to thrive, financially. Clearly, it would be disproportionate to protect freedom of expression in those circumstances at the expense of the damage done to the claimant's reputation and his/her private and family life. Lord Neuberger saw something of this point when he said, in *O v Rhodes*, 'unless it is necessary to do so, I am unenthusiastic about deciding whether a book, or any other work, should be published by reference to a judge's assessment of the importance of the publication to the public or even to the writer.'<sup>100</sup> There, his concern was with whether the book was truthful or not. Here, our concern is whether the article is sufficiently interesting and attention-grabbing with a person's identity included or not. The two are irrelevant as questions of law. To my mind, the unassailable significance of naming individuals is its contribution to the administration of justice: that this may result in other evidence becoming available or allowing inferences to be drawn from the absence of such. But, the importance of this information cannot be quantified. Audiences may well derive nothing of any actual significance from such reporting. It may be that, in actuality, as much is learnt through naming an individual as not naming them. This does not matter because there is both an intrinsic and instrumental value in open justice.

This approach does not mean that the proportionality principle is ignored. There is scope to protect privacy and reputational interests where the press report in a manner that exceeds accurate and fair reporting. For example, this might be the case if the press were to devote coverage to a suspect's family life; to conduct interviews with his friends, family and work colleagues and report them; to take intrusive photographs of him and his family going about their daily lives. In those circumstances, it may be said that the press has exceeded its right to report proceedings fairly and accurately. But not otherwise.

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<sup>95</sup> See discussion in Aharon Barak, *Proportionality*, (Cambridge University Press, 2012).

<sup>96</sup> N 88, [96]-[97].

<sup>97</sup> N 2, [34].

<sup>98</sup> Re S, n 37, [34].

<sup>99</sup> Re Guardian News and Media Ltd, n 35, [63].

<sup>100</sup> N 88, [96].

## 5. CONCLUSION

Open justice is a constitutional principle of the highest order. It is subject to the strictest exceptions. It can be disapplied only when the administration of justice is disserved by adherence to it. Freedom of expression is the chief vehicle by which open justice is realised. Consequently, it cannot be that there is no presumptive priority between privacy and free speech in misuse cases touching on open justice. It must be that the misuse claim will fail unless the narrow exception applies. As is evident from the discussion above, harm arising from publication does not satisfy this exception. It must be shown that the information at stake is being misused.