



# What are the secrets to securing and resisting privacy injunctions that protect reputation?

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## Procedural law – two distinct tests



### **Defamation/Malicious Falsehood**

*Bonnard v Perryman*: no injunction where defendant (credibly) asserts an intention to rely on a substantive defence.

### **Privacy (and other torts of publication)**

Human Rights Act 1998, s12(3): claimant “likely” to succeed at trial.

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## Substantive law – gradual convergence



- *McKennitt v Ash* [2008] QB 73: false information can be protected as private.
- *Re Guardian News & Media Ltd* [2010] 2 AC 697: reputationally damaging publications may engage ECHR art 8.
- *Hannon v News Group Newspapers Ltd* [2015] EMLR 1: not clear that reputation can only be protected in a defamation claim. No bright line distinction.

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## Substantive law – gradual convergence



- *PJS v News Group Newspapers Ltd* [2016] AC 1081, [32]: disclosure of purely private sexual encounters “*even though they involve adultery*” will “*on the face of it constitute the tort of invasion of privacy*”
- *Khuja v Times Newspapers Ltd* [2017] 3 WLR 351, [34](3): “*A party is entitled to invoke the right of privacy to protect his reputation*”
- *Richard v BBC* [2018] EMLR 26, [248]: generally, suspect has a reasonable expectation of privacy in relation to a police investigation; damages for injury to reputation recoverable in a privacy action.

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## Which test for an injunction applies?



- *McKennitt v Ash* [2008] QB 73, [79]:

*“If it could be shown that a claim in breach of confidence was brought where the nub of the case was a complaint of the falsity of the allegations, and that that was done in order to avoid the rules of the tort of defamation, then objections could be raised in terms of abuse of process. That might be so at the interlocutory stage in an attempt to avoid the rule in *Bonnard v Perryman* ...”*

- But what does “abuse” look like now, in light of *Khuja*?

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## Tips for applicants



### **(1) Be consistent, clear and candid**

See e.g. *LJY v Persons Unknown* [2018] EMLR 19

Contrast, e.g. *Khan v Khan* [2018] EWHC 241

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## Tips for applicants



### **(2) Remember, privacy is multi-faceted**

*“As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.”*

*Murray v Express Newspapers Plc [2009] Ch 481, [36]*

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## Tips for applicants



So, are there points to be made about:

- The method by which the information has been obtained?
  - See e.g. *TRK v ICM* [2016] EWHC 2810 (hacking)
- The respondent's purposes?
  - See e.g. *LJY; NPV v QEL* [2018] EWHC 703 (blackmail); *TRK* (revenge)
- The likely impact of publication on the applicant and their family (especially children)?
  - See e.g. *PJS* ; *Goodwin v News Group Newspapers Ltd* [2011] EMLR 27; *SSHD v AP* [2010] 1 WLR 1652

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## Tips for applicants



### **(3) Adduce detailed evidence from the applicant personally (and other affected individuals)**

- *Terry v Persons Unknown* [2010] EMLR 16
- *Goodwin v News Group Newspapers Ltd* [2011] EMLR 27
- *YXB v TNO* [2015] EWHC 826

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## Tips for respondents



### (1) Look for signs of “abuse”

- Inconsistency in correspondence
- Inconsistent prior conduct
- Failure to define the private information
- Commercial motives (*Terry; GYH v Persons Unknown* [2017] EWHC 3360 [39])
- Lack of personal testimony

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## Tips for respondents



### (2) Can you diminish the privacy element by agreeing not to publish intimate details/photos?

- *Terry* [69]
- *YXB* [62]

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## Tips for respondents



**(3) Arguments based on the applicant's status as a public figure/someone who has surrendered their privacy may be stronger in a case with a reputational aspect**

- *Spelman v Express Newspapers* [2012] EWHC 355 [66]-[72]
- *GYH v Persons Unknown* [33]-[36]
- *Axon v MoD* [2016] EMLR 20

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## Tips for respondents



### (4) Public domain arguments appear to fare better where there is a reputational element

- *ZXC v Bloomberg LP* [2017] EMLR 21 (article complained of already published; prior article referring to criminal investigation and the C published without challenge);
- *Jackson v BBC* [2017] NIQB 51 [79], [83] (information about criminal investigation into Irish rugby players already publicised)

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## Tips for respondents



### (5) There may be different or stronger public interest arguments

- Iniquity
- Contribution to a public debate concerning applicable standards: *Goodwin* [133]; *ABC v Telegraph Media Group Ltd* [2019] EMLR 5 [23]
- Encouraging witnesses to come forward (*Khuja*, esp. in CA, [17])
- Correcting false public image

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## Tips for respondents



### (6) Are damages an adequate remedy?

- *Terry*
- *Spelman*