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Privacy, Third Parties and Judicial Method:  
Wainwright’s Legacy of Uncertainty

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Introduction

In the aftermath of the House of Lords cases of Wainwright v Home Office¹ and Campbell v MGN,² privacy law in England developed in a distinctly fragmentary fashion. In Wainwright, the House disavowed the possibility of recognising a general tort of privacy, prioritising the maintenance of legal certainty by limiting the development of the law.³ In keeping with this desire to limit the expansion of privacy law, the subsequent and seminal case of Campbell gave birth to English law’s private facts tort, known as “misuse of private information” (MPI).⁴ This essay calls into question the legacy of the Wainwright decision. It argues that, in opting to leave the law to develop in a fragmentary fashion (rather than recognise a “blockbuster”⁵ privacy tort), it has left open the door to inconsistency and incoherence. Judges have demonstrably been anxious to secure justice for vulnerable individuals. However, with Wainwright requiring the courts to force all informational privacy claims into (the sometimes ill-fitting) tort of MPI, the judiciary has stretched and developed that tort in ways that were not only unforeseeable, but which undermine some of the core features of private law that have long been taken for granted.

In order to highlight the issue, this essay focuses on one particular aspect of post-Campbell doctrine. This is the way in which the interests of unrepresented third parties (usually the children of claimants) have come to occupy a central place in MPI method. The development is portrayed by the courts as a straightforward application of existing doctrine. However, a detailed examination of these cases reveals that the issue is anything but straightforward.

The significance of making third party interests relevant becomes apparent when one considers that, traditionally, private law claims are bilateral disputes; the only parties whose interests are relevant are the represented parties (the claimant and defendant). This is particularly true in equitable breach of confidence cases which, traditionally founded on a relationship between the parties akin to a trust, necessarily excluded the interests of others.⁶

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¹ Wainwright v Home Office [2003] UKHL 53, [2004] 2 AC 40 ("Wainwright")
² Campbell v MGN Ltd [2004] UKHL 22, [2004] 2 AC 457 ("Campbell")
³ See Wainwright, (n 1) at [26] per Lord Hoffmann. I do not defend this conception of the judicial role – indeed it seems to me to be deeply problematic in a system of common law that hopes to keep up with societal changes. Nevertheless, it is quite clearly the primary concern underpinning the Wainwright ruling. On the ineffectiveness of such a rigidly formal conception of the judicial role, see generally EW Thomas, The Judicial Process (CUP 2006).
⁴ Campbell, (n 2) [14]
⁶ The precise nature of the relationship between equitable confidentiality and the tort of MPI has not been conclusively established. Recently the High Court and Court of Appeal have concluded that the two actions exist in parallel (see Vidal-Hall v Google [2014] EWHC 13 (QB) and Google v Vidal-Hall [2015] EWCA Civ 311), and the Supreme Court has recently refused permission to appeal that aspect of the matter any further.
In tort law, the bilateral nature of the claim is no less acute. As Ernest Weinrib observes, tort law is based upon “the bipolar procedure that links [claimant] and defendant”, in which “the [claimant] sues the defendant and, if successful, is entitled to the defendant’s performance of a remedial act.”

This essay is concerned with ostensibly “pure” private law cases – specifically those brought in the tort of MPI which do not feature public bodies as parties to the litigation. In the cases of CDE v MGN and K v NGN, upon which the analysis will focus, the interests of unrepresented third parties – most notably the children of the claimants – were considered relevant by the courts to the determination of the main claim.

In traditional private law claims, third party interests would not be considered relevant to the resolution of the dispute. By contrast, the impact of court orders on third parties has long been relevant in areas of public and family law. The waters are muddied slightly by the influence of policy considerations upon findings of liability (and the extension of heads of liability) in English tort law, since this entails considering the impact of liability upon persons other than the parties. However, taking into account broad-brush policy considerations (often based on a rather speculative idea of what best serves the public interest) differs from the phenomenon we observe in the third party interest cases. For, in these cases, specific interests of particular individuals are taken into account (and, in effect, specific rights are granted to them). Moreover, even if this distinction were not as significant as I suggest, policy considerations that are openly acknowledged are far less objectionable than instances (such as

However, the reasoning in both the High Court and Court of Appeal judgments is regrettably lacking a detailed explanation of MPI’s doctrinal roots. As such, there is still scope for debate as to whether MPI ought properly to be considered an extension of equitable confidentiality or a freestanding tort inspired by the older doctrine but based on different underlying principles (or, indeed, something else entirely). For a helpful survey of earlier responses to this particular issue, see Rebecca Moosavian, “Charting the Journey from Confidence to the New Methodology” (2012) 34(5) EIPR 324.

8 There are also some cases in which ostensibly private law actions take on a primarily public focus because they are brought by public bodies. In Commissioner of Police of the Metropolis v Times Newspapers Ltd, [2011] EWHC 2705 (QB), [2014] EMLR 1, the claimants, both public bodies, brought an action for breach of confidence (alongside actions for breach of the Data Protection Act 1998 and conversion) in respect of leaked operational documents. The defendant newspaper intended to use the documents in its defence to a libel action brought by another individual. In making their case, the claimants made extensive reference to the potential for harm to come to unrepresented third parties should the documents be used and reported in open court. As Tugendhat J notes in that case, however, “[c]laims for breach of confidence [brought] by public authorities are different from claims by individuals” (at [15]). The reason for the difference was spelled out by Lord Goff in Attorney General v Observer Ltd (No.2) (“Spycatcher”) [1988] UKHL 6, [1990] 1 AC 109. There is a “continuing public interest that the workings of government should be open to scrutiny and criticism … in such cases, there must be demonstrated some other public interest which requires that publication should be restrained” (at 283C-D, 285H). The claimants, moreover, considered that the interests of third parties, in particular their Article 8 rights including the control of personal data, triggered the claimants’ s.6 HRA obligation to act compatibly with Convention rights and thus mandated their bringing the claim. Commissioner v Times, then, is an unusual breach of confidence case; it is brought by the claimants exclusively on the basis of third party interests. That is, however, an inevitable consequence of the claimants’ status as public bodies. The fact that they brought the claim under a cause of action traditionally considered part of private law does not alter the fact that this is a case with a primarily public focus.
10 Rather, those who experience losses and might be classed as third parties can, in some instances, initiate their own claims, such as under the Contracts (Rights of Third Parties) Act 1999. See also Dobson, n 88 (below) and accompanying text.
11 For avoidance of doubt, in this essay I treat family law cases as distinct from those which I refer to as traditional private law claims (by which I primarily mean cases in tort, equity and contract).
in the third party cases) where such interests are taken into account in a manner that obscures the fact that a development is taking place in the law. Moreover, because the developmental dynamic present here is obscured, the normative rationale underpinning it is also hidden from view. We cannot immediately see why the courts may be justified in making this move. This, I argue, is highly unsatisfactory. For assuming the essay correctly shows that the courts were not obliged as a matter of formal law to take these interests into account, the decision to do so anyway must have a normative dimension. But this dimension is one which has never been made plain and which thus causes uncertainty and invites speculation.

This third party issue is thus significant because the courts’ treatment of it alters the traditionally bilateral structure of a particular type of tort claim (MPI). It does so seemingly in the name of securing the ECHR rights of vulnerable parties. This may have profound implications. It suggests that, potentially, any tort may be developed in such a way as to accommodate third party interests. This sets the courts’ approach in the MPI cases upon which we will dwell substantially apart from that in other torts.\(^\text{12}\)

None of the issues raised by the third party cases upon which the essay focuses are necessarily irresolvable. Indeed, the essay will propose and discuss two theories (the “incremental accommodation” theory and the “inseparability” theory) that may be inferred from the case law and may provide ways of understanding the third party cases. Central to the first of these is the concept of “incrementalism” – the manner in which the common law is developed. The second theory involves reworking and broadening our understanding of the nature of the Article 8 right itself to embrace the integrity of the whole family unit. Both theories are, however, problematic. Finding a workable solution is a more complex matter than the courts appear to have appreciated. The courts, then, have treated as straightforward a matter that is – in reality – anything but.

The analysis which follows casts serious doubt on the efficacy of Wainwright’s attempt to secure legal certainty in privacy law going forward. Although it will point up problems with their reasoning at a formal level, this essay is not intended as an attack on the third party interests line of cases. Rather it is an attack on Wainwright itself for creating an environment so formally restrictive that the courts have been left with little option but to develop the law in ways that necessarily end up undermining legal certainty if they are inclined to secure justice for vulnerable parties. In essence, it suggests that forcing the courts to attempt to achieve just outcomes for vulnerable parties through a tightly circumscribed mechanism – the informational tort of MPI – does more harm than good. It is, to use a colloquialism, an instance of the proverbial chickens coming home to roost. For the courts are committed to protecting the vulnerable – particularly children – and this is no bad thing in itself. Their efforts to do so, however, result in an unpredictable stretching of MPI that even goes so far as to rewrite the basic, bilateral structure of the claim.

Having set out the aims of the essay, we will begin with an analysis of the third party cases. Whilst the cases of \(\text{CDE}\) and \(\text{K}\) deal with essentially the same issue, they do so in quite different ways and so the essay will deal with each in turn, starting with \(\text{CDE}\).

### The relevance and importance of third party interests: the cases

**\(\text{CDE v MGN}\)**

\(^{12}\) See Dobson v Thames Water, n 88 (below), and accompanying text.
The first claimant, CDE, was a man who regularly appeared on television, and the second claimant, FGH, was his wife. They sought an injunction restraining the defendants from publishing details of a “quasi-relationship” between CDE and another woman, X. The first defendant was publisher of the tabloid *The Mirror*. X was the second defendant, who wished to sell her story. As is the case with so many of these privacy cases, the application was for interim injunctive relief. This requires the court to determine, often on the basis of limited evidence, whether it is “likely” that the claimant will succeed in obtaining a permanent injunction at trial. If the court is not convinced that is likely, no injunction will generally be granted.

In his judgment, Eady J asserts that third party interests have relevance to his decision-making in the following terms:

> Publication is likely to prove distressing to the Claimants, and almost certainly to their children … Although there can be little doubt that the coverage contemplated would be intrusive upon the Claimants’ family life and bring bewilderment and distress to their children, it is correspondingly true also of the Second Defendant’s family. She too has a young daughter (and another who is now an adult). I have no doubt that these are all persons whose Article 8 rights are currently engaged…

In this case, it is a question of balancing the rights of the Claimants (and/or their family) under Article 8 and Article 6, on the one side, with those of the Defendants under Article 10.

The defendant’s primary objection to the court considering the interests of third parties was that it disregarded the traditional bilateralism of private law claims:

> As I understand the attitude of the newspaper, it is simply that a married man cannot be accorded greater rights or consideration by the court than a single man and, in so far as there may be any impact on his family, that is too bad.

Eady J, however, was swift, emphatic and explicit in his rejection of that argument:

> Yet it is now well established that the first question a court has to address on applications of this kind is whether Article 8 rights are engaged. As to that, the threatened publication would undoubtedly engage the Article 8 rights of all the persons I have identified. The fact that the First Claimant has a wife and children simply means that there are more persons whose rights have to be taken into account. They cannot simply be ignored on the basis of traditional arguments along the lines of who has a cause of action and who does not. Since they would at least potentially be affected by the exercise of

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14 CDE. (n 9) [6]
15 ibid, [83]
16 ibid, [7]
the Defendants’ Article 10 rights, their Article 8 rights have to be weighed in the balance.17

Eady J’s aim (to take seriously the interests of the children) is noble; it is certainly morally appealing. But that does not mean that it is grounded firmly in existing law. There is a subtle but important (and rather clutch-less) shift in this segment of his judgment. For he states that it is “well established” that the courts begin with an assessment of whether Article 8 rights are engaged.18 From this he moves to determine whether anyone’s Article 8 rights are engaged, not just those of the claimants. It is certainly well established that the court must begin with an assessment of whether the claimants’ Article 8 rights are engaged. But it is far less clear whether the law requires that the search for engaged Article 8 rights be broadened beyond that. When the MPI tort was first recognised in Campbell, Lord Nicholls phrased the engagement test thus: “[e]ssentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.”19 The reasonable expectation of privacy question, moreover,

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.20

Nothing in this well established test even suggests the relevance of third party interests. Rather, it reflects the traditional, bilateral framework of tort litigation. Likewise, the refinement set out by Lord Steyn in Re S expressly limits the court to conducting “an intense focus on the comparative importance of the specific rights being claimed”.21 It might be said that Lord Nicholls, when he stated in Campbell that “[t]he values embodied in articles 8 and 10 are as much applicable in disputes between individuals … as they are in disputes between individuals and a public authority”,22 was seeking to harmonise the approaches to adjudicating public and private privacy claims. Eady J in Mosley picked up on this when he said:

as Lord Nicholls at [17]–[18] and Lord Hoffmann at [50] observed in Campbell in 2004, … private individuals and corporations (including the media) … are obliged to respect personal privacy as much as public bodies. It is not merely state intrusion that should be actionable.23

However, one must understand Campbell in context. At that time, there was much debate about the extent to which the HRA had “horizontal effect”.24 For instance, one influential

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17 ibid, [7]
18 ibid, [7]
19 Campbell, (n 2) [21] (emphasis added)
22 Campbell, (n 2) [17]
commentator had denied the possibility of any horizontal application of human rights law. A more conservative reading of Lord Nicholls’ statement might take it as simply making clear that the HRA does indeed have some, indirect horizontal effect. On that matter the whole House was in agreement. Moreover, it is inescapable that Lord Nicholls’ statement – howsoever it is read – recognises the need for a violation to be “actionable”. It is well established that a person whose informational privacy is violated is entitled to seek redress as much against the media as against the state, but that person must bring the action. It does not directly follow from any of these authoritative statements of law that third party interests can be relied upon by claimants seeking to bolster their own claim.

The only authorities Eady J cites in support of his broad reading are Secretary of State for the Home Department v AP (No.2) and Donald v Ntuli. The fact he points to just two cases must call into question the extent to which his reading is in fact “well established”. The passage from AP was a repetition by Lord Rodger of what he himself had said six months earlier in In re Guardian. He stated that, when balancing individual privacy against freedom of expression, the court had to ask the following question:

Is there a sufficient general, public interest in publishing a report of the proceedings which identifies the person concerned to justify any resulting curtailment of his right and his family’s right to respect for their private and family life…?

In re Guardian was not a bilateral private law case, and did not concern the misuse of private information. It was a case concerning the media’s right to name publicly the applicants in judicial review proceedings in which the applicants were challenging their designation as suspected terrorists. Section 6 HRA does not discriminate between the Convention rights of represented and unrepresented parties to such proceedings, because the decision whether or not to grant anonymity is a procedural, rather than a substantive, matter.

What muddies the water somewhat is the obligation on the courts themselves not to act incompletely with ECHR rights, which is imposed by virtue of s.6(1) and s.6(3)(a) of the

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The notion that this is well established resurfaces in more recent cases, such as AAA v Associated Newspapers [2012] EWHC 2103 (QB), [2013] EMLR 2 (at first instance) and [2013] EWCA Civ 554 (on appeal). However, these more recent pronouncements are based upon the authorities cited in K v NGN, rather than those relied upon by Eady J. We will return to the K authorities below. But the fact that Eady J asserts that this is well established by authorities which have not been taken to provide evidence of its being well established in later cases weakens his position (in formalist terms) considerably.

In re Guardian News and Media Ltd [2010] UKSC 1, [2010] 2 AC 697, [2010] 2 WLR 325. AP was a case concerning the identification in court of a suspected terrorist who had been made subject to a control order. The applicant wished to maintain his anonymity and the Home Secretary concurred. Moreover, the applicant did not at any point assert any third party interest that might bolster his case; the matters weighing in favour of maintaining anonymity related to him and him alone. The statement of law repeated in AP therefore did not apply in any way to third parties in that case and, insofar as it refers to third parties, it is clearly obiter.

In re Guardian, ibid, [50-52], cited in AP (n 26) at [7] and CDE (n 9) at [85].
HRA. Alison Young (drawing on the work of Ian Leigh) makes a helpful distinction between “procedural” and “remedial” forms of horizontality, both of which are derived from the s.6 obligation.31 She explains:

*Procedural horizontality* occurs when the court, as a public authority, exercises its inherent or statutory powers to regulate its own procedures by managing cases or granting court orders, which create obligations on private individuals bound by such court orders. … *Remedial horizontality* occurs when courts exercise their discretionary powers to grant remedies, where … they must ensure that the remedy in question is not contrary to Convention rights. A discretionary remedy may include an injunction to prevent a private individual from acting in a manner incompatible with Convention rights.32

Young cites *Re S (a child)* as an example of procedural horizontality. In that case, the House of Lords granted an injunction prohibiting the publication of the name of a defendant in a criminal case who was charged with the murder of one of her sons, in order to protect the privacy interests of her surviving son (who might otherwise have been easily identified).33 Because the litigation concerning the prohibitory injunction was separate from the criminal trial, the case is rightly classified by Young as procedural.34 Most MPI cases, by contrast, exhibit remedial horizontality, since the application for an injunction is part and parcel of the primary litigation itself (albeit dealt with as a preliminary matter). This is because very few MPI cases ever go to trial; for the vast majority, the granting of an interim injunction is, in practice, sufficient to prevent publication of the private information ever occurring. There are two reasons for this. First, because the newsworthiness of the information often diminishes quickly so that media defendants are less interested in publishing it further down the line. Second, because the test applied by the court in determining whether to grant the injunction is whether “the applicant's prospects of success at the trial are sufficiently favourable”.35 In other words, an interim injunction will (generally) be granted only where it is likely that a permanent injunction will be awarded following a trial of the issues. It is not controversial that, in either of these sorts of circumstances, the court must consider the impact of its decision upon the Convention rights of the *named* parties; that is the nature of the s.6 obligation.

The jurisdictional basis for the granting of injunctions in procedural and remedial circumstances is, however, not identical. In procedural cases, the court is the primary decision-maker and the parties have a statutory right (under s.6) to have their Convention rights taken into account. In remedial cases, the court is the arbiter of a dispute between the parties. Its power to grant an injunction is, like in procedural cases, discretionary. But it does not solely derive from its inherent or statutory powers. It requires also that the claimant have some right at common law to the injunction (ie because the defendant has breached a common

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32 ibid, 22 (emphasis is original)

33 Re S (n 21)

34 The recent cases of *F v G* (2012) UKEAT/0042/11/DA and *EF v AB* (2015) UKEAT/0525/13/DM are examples of third party interests being correctly considered in the context of procedurally-generated injunctions. Both involved anonymity orders relating to Employment Tribunal cases relating to allegations of sexual impropriety in the work place, publication of the details of which would have enabled the identification of third parties who were indirectly involved.

35 *Cream Holdings* (n 13)
law right of the claimant’s, such as the right to the non-misuse of private information). Unless that underlying common law right is present, the power to grant a remedial injunction has nothing upon which to bite. Moreover, the court’s obligation is, as Young states, to “ensure that the remedy in question is not contrary to Convention rights”.\(^{36}\) The remedy is claimed by one (and awarded against the other) party. Thus where a third party has no common law right to claim a remedy, and therefore there is no possibility of granting them an injunction, there is no formal compulsion upon the court under the HRA to take that third party’s Convention rights into account.

This is the same basic rationale that justifies the courts in not developing the common law in such a way as to give third parties their own claim irrespective of that which the parent might have.\(^{37}\) The rationale derives from the ethos of indirect horizontality: that the (bilateraly structured) common law is the mechanism through which Convention rights are addressed horizontally. So long as the courts apply the common law (and, if necessary, develop it incrementally) in a manner that is compatible with the Convention rights of the named parties, the s.6 obligation is satisfied. The s.6 obligation does not require the courts to amend further the common law in order to act compatibly with (or secure) the Convention rights of individuals who are not parties to the litigation and to whom the common law grants no right to a remedy in the instant case.

Thus whilst it may be necessary for the court to develop the common law in order to ensure the named parties’ Convention rights are afforded a sufficient degree of protection, the court is not formally required by the HRA to consider the Convention rights of third parties.\(^{38}\) Moreover, if the court does decide to consider the Convention rights of third parties, it ought to recognise that it is developing the common law. Such a development may not necessarily be objectionable (a matter to which we shall return, below), and indeed it is not the aim of this essay to object to it. But such a development ought to be recognised for what it is. With great respect, Eady J does not seem to have appreciated this in his wholesale adoption of the In re Guardian statement.

Eady J also cites the Court of Appeal’s judgment in Donald v Ntuli as supporting his decision to take into account third party interests. Yet this does not actually provide much in the way of clear, reasoned confirmation of his approach. Donald was an appeal from a decision of Eady J himself in the High Court in which he had granted a so-called “super injunction” to a claimant prohibiting the defendant from disclosing various private details about a relationship they had previously had.\(^{39}\) The Court of Appeal upheld Eady J’s decision in part, although it discharged the anonymity and the restriction on publishing the details of the judgment itself. Apart from repeating the same phrase from In re Guardian (which the court likewise attributed to AP), the Court of Appeal’s only reference to third party interests came when Maurice Kay LJ stated that Eady J “had proper regard to the possible impact of publicity on the parties’ respective children”.\(^{40}\) There is nothing that suggests the issue of propriety in this regard was argued before the Court of Appeal, and no authority was cited by the court explaining its assertion that Eady J’s regard for third party interests was “proper”. Eady J’s

\(^{36}\) Young, (n 31) 22 (emphasis added)

\(^{37}\) See the Court of Appeal’s rejection of the claimant’s (the child of the subject of the private information) attempt to secure an injunction in MPI to prevent publication in O v A, discussed (and citation given) at n 94, below.

\(^{38}\) This is the approach taken in Dobson v Thames Water (see n 88 (below) and accompanying text).

\(^{39}\) Eady J’s original decision in Donald is unreported.

\(^{40}\) Donald, (n 27) [24]
reference to Donald in CDE thus amounts to the mere citation of a bare affirmatory statement from the Court of Appeal upholding, in part, one of his own decisions.

It is also relevant that in Ambrosiadou v Coward,41 which actually pre-dates CDE by five months, Eady J similarly held that the interests of the parties’ 13 year-old son were of “particular significance” in an application for injunctive relief in respect of information, some of which directly concerned the son (a point of distinction from CDE). In that case, Eady J made his position on third parties plain when he stated that “[the son’s] rights under Article 8 of the Convention certainly need to be borne in mind throughout – even though he is not a party to his litigation.”42 Indeed, the judge insisted that “it must be right … to take into account the rights of the son.”43 However, unlike the more developed reasoning in CDE, the Eady J cited no authority whatsoever for the relevance of third party interests on that occasion, suggesting that, prior to CDE, whilst he had come to the view that third party interests were relevant, he had yet to identify any supporting authority.

The decision by Eady J to take into account third party interests in CDE thus appears to be on less than entirely solid formal ground. In the light of this, we will now turn our attention to our second case, K v NGN.44

K v NGN

K concerned information pertaining to an adulterous affair conducted between a well-known male in the entertainment industry and a work colleague. In K, the Court of Appeal held that the Article 8 ECHR interests of the claimant’s children, who were not parties to the proceedings (and did not give evidence), were amenable to being taken into account when weighing and balancing the competing Convention rights of the claimant and defendant. The issue and conclusion are thus very similar to those in CDE, although in K we have the benefit of a somewhat more detailed judgment on these points.

The judgment indicates that, when conducting the balancing exercise, the court “should accord particular weight to the Article 8 rights of any children likely to be affected by the publication, if that would be likely to harm their interests”.45 Ward LJ (with whom Laws and Moore-Bick LJ agreed) placed a high value on the interests of the claimant’s children in this particular instance:

the benefits to be achieved by publication in the interests of free speech are wholly outweighed by the harm that would be done through the interference with the rights to privacy of all those affected, especially where the rights of the children are in play.46

The potentially detrimental effect that publicising their father’s extra-marital affair might have on his children, particularly in the context of their school lives, looms large in Ward LJ’s judgment. He is concerned by the “ordeal of playground ridicule … that would

42 ibid, [29]
43 ibid, [33]
44 K (n 9). For a summary of the key issues in K, see TDC Bennett, “The Relevance and Importance of Third Party Interests in Privacy Cases” (2011) 127 LQR 531.
45 K, (n 9) [19]
46 ibid, [22] (emphasis added)
inevitably follow publicity.” He asserts that “the playground is a cruel place where the bullies feed on personal discomfort and embarrassment.” He accords this sort of harm “particular weight”. It is worth noting that there is no indication that Ward LJ heard any evidence on the level of cruelty the children could expect to encounter in their school playground – indeed the language he uses makes plain that he is assuming this apparently “inevitable” hardship.

Ward LJ relies upon three cases, and two subtly different legal justifications, to support his assertion that the children’s interests are relevant. The first, which he acknowledges takes place in “another context”, is Beoku-Betts v Secretary of State for the Home Department, wherein Baroness Hale commented, in a short judgment, that

the central point about family life … is that the whole is greater than the sum of its individual parts. The right to respect for family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed.

Beoku-Betts was a deportation case, and it ostensibly centres on the issue of third party interests. The appellant appealed against the decisions of the Court of Appeal and the Immigration Tribunal which had overturned the determination of the immigration adjudicator and upheld the Home Secretary’s decision to deport him. The adjudicator had, in determining that he should not be deported, directed himself to “consider whether the interference with the appellant’s family rights, which would obviously interfere with the family as a whole, is justified”. He therefore considered the adverse impact upon third party family members, concluded that the interference with the rights of the family was not proportionate to the legitimate aim of controlling immigration, and allowed the appeal. The Home Secretary appealed this decision and was successful in both the Immigration Appeal Tribunal and the Court of Appeal, both of which found that the adjudicator had misdirected himself in law and that he ought only to have considered the impact upon the appellant’s Article 8 rights in isolation from other family members.

The House of Lords held that the third party interests were relevant and should have been taken into account by the Home Secretary when making the decision on deportation. The House accepted the appellant’s arguments that, if the case were appealed to the ECtHR, that is the approach that would be taken there. Moreover, to do otherwise would leave the remaining family members with no option but to initiate their own proceedings under s.7 HRA.

The issue of the relevance of third party interests in deportation cases has an apparently complex judicial history since the coming into force of the HRA 1998. We need not concern ourselves with the detail of it, save to note that there was no clear determination of the law’s requirements either way until the House decided Beoku-Betts. What must be remembered, however, is that – as with all deportation cases – this was a “vertical” human rights appeal

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47 ibid, [17]  
48 ibid, [17]  
49 Indeed, in K, the interests of the claimant’s children did not even form part of claimant counsel’s submissions. I am grateful to Hugh Tomlinson QC (who acted for the claimant) for this insight.  
50 K, (n 9) [17]  
52 ibid, [4].  
53 Quoted in Beoku-Betts (ibid) at [12].  
54 Lord Brown sets out the history of this line of cases in Beoku-Betts (ibid) at [24]-[40].
against a decision of a public authority. The Home Secretary was bound by s.6 HRA not to act incompatibly with Convention rights – an obligation which does not discriminate between primary litigants and third parties. The Home Secretary need only ask herself whether her decision engages any Article 8 rights – engagement is the touchstone in that instance that ought to put her on alert.

This is significantly different from a case in misuse of private information. In MPI, the first question for the court is not a straightforward one of engagement of Article 8, but rather the question whether the claimant has a reasonable expectation of privacy. This covers much of the same ground as the engagement question – indeed if the answer is “yes” then clearly the claimant’s Article 8 rights are engaged – but it is not the same question. For if the claimant’s Article 8 rights are not engaged, the case falls at that point. No third party interests would ever be considered, since they have been brought into play (in cases like CDE and K) only at the second stage where the court conducts the “ultimate balancing test”. Beoku-Betts, then, is even further removed from the circumstances of the MPI cases than In re Guardian, because it does not require the court to determine a procedural matter to which third parties’ Article 8 rights are relevant. It simply involves judicially reviewing the Home Secretary’s failure to abide by her own statutory obligations. In relying upon this authority, Ward LJ seemingly fails to appreciate the distinction between the vertical and the horizontal types of case in which human rights are in issue.

Ward LJ also presents a subtly different, secondary line of justification for his decision to consider the interests of third parties. This is the argument that the court must consider “the best interests of the child”, and as such it calls to mind that well established principle of family law. He cites Neulinger v Switzerland, which is an ECtHR decision on deportation from the 1970s, from which he takes the broad observation that the ECHR cannot be interpreted as if in a legal vacuum; it warrants understanding as part of a wider set of supra-national human rights treaties including the International Convention on the Rights of the Child. In particular, he quotes the court stating

there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount.

He further cites the House of Lords’ decision in ZH (Tanzania) v Secretary of State for the Home Department. In that case, the Supreme Court held that the adverse effect upon the child of a non-citizen parent against whom deportation proceedings were being brought,
when that child would inevitably have to leave with the parent if she were deported, must be taken into account. Ward LJ states that the “universal” principle that the court should act in the child’s best interests “cannot be ignored” in such a matter as the instant case. He takes inspiration from Lord Kerr, who, in ZH, stated that

in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not … a factor of limitless importance in the sense that it will prevail over all considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed, unless countervailing reasons of considerable force displace them.

However, Ward LJ is not prepared simply to adopt this guidance without qualifying it. For … the interests of children do not automatically take precedence over the Convention rights of others. … The force of the public interest will be highly material, and the interests of affected children cannot be treated as a trump card.

The principle that the courts must accord great weight to the best interests of the child, where it appears in English law, is generally a statutory duty. In such instances, it is an absolute requirement. When family law cases involving children are dealt with under the common law, as the court exercises its wardship jurisdiction, the requirement is not absolute but clearly weighty. But what marks these family cases out from the scenario facing the court in K is the evidential basis upon which the court makes its decision. In applications for care orders, for instance, the court will act on what it considers to be the child’s best interests after having received evidence on that very issue. In K, there is no sign that the Court of Appeal considered any evidence as to the potential bullying of the children. It seems clear enough (even though the decision is not reported) that the High Court which considered the application and gave an ex tempore judgment initially refusing the claimant injunctive relief did not consider any such evidence either, since Ward LJ finds it difficult to determine whether Collins J even took into account the children’s interests.

It is quite clear that Ward LJ perceives the risk of bullying to be a genuine one. However, it is surely arguable that making a finding of the risk of harm to the interests of children based on no evidence, and according that risk sufficient weight to override Article 10, of itself constitutes a disproportionate interference with the defendant’s Article 10 rights. It goes against the grain of s.12(4) HRA, which requires the courts to pay particular attention to the importance of freedom of expression “where the proceedings relate to material which the respondent claims … to be journalistic.” Of course, requiring a solid evidential basis for taking these interests into account raises the expensive spectre of extended litigation on these

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62 K, (n 9) [19]
63 ZH, (n 61) [46]
64 K, (n 9) [19]
65 For example, under s.1 Children Act 1989.
66 K, (n 9) [14]: “It is not at all clear to what extent if at all, Collins J. had regard to the Article 8 rights of anyone bar the appellant.”
issues, which may not be desirable. Nevertheless, imposing injunctions partly on the basis of concerns that have no evidential grounding is not an adequate solution.

Notably, whilst the case of CDE was an authority on point which was available to the Court of Appeal in K, the court did not refer to it. It was not cited in argument and we are left to presume that it did not come to the judges’ attention. Thus the Court of Appeal’s decision in K stands before a doctrinal backdrop which is somewhat oblique. The deportation jurisprudence first muddies the distinction (if indeed any distinction now remains, in the light of K) between the courts’ obligations in vertical public law cases and horizontal private law claims. Its second effect is to provide (at best) support for a broad principle that the court ought to consider the best interests of children in cases where children are involved, but these are not to be regarded as automatically trumping competing interests. None of the cases cited provide analogies with more than a fleeting resemblance to the case at hand and indeed all of them are, due to their vertical nature, clearly distinguishable. A formalistic application of this doctrine, then, does not specify as a matter of necessity the approach taken in K.

Having demonstrated that the taking of third party interests into account was not a formal requirement on the courts in either CDE or K, we will next turn to a discussion of the impact of those rulings and an exploration of how they might plausibly be explained.

**Discussion**

We have seen that, in cases involving children, the courts have been willing to allow third party interests to influence the balance which they must strike between Articles 8 and 10 ECHR. The stretching of the law is particularly remarkable in CDE and K, for it pulls away from the traditional bilateral structure of private law (which dealt only with the rights of those parties involved in the proceedings) and into the realm of the sort of all-encompassing assessment of impact upon Convention rights associated with vertical, public law cases. Particularly troubling is the lack of detailed consideration or explanation by the judges of this effect of their rulings. Indeed, there is no indication in either case that the judges even appreciated the tension between their approach and the traditional bilateralism of private law to which the judgments give rise.

Notwithstanding the lack of a clear or deeply entrenched formal basis for the recognition of the relevance of third party interests in cases such as CDE and K, their appearance in both pleadings and judgments has quickly become accepted practice. In Rocknroll v NGN Ltd, Briggs J was prepared to accord significant weight to the interests of the claimant’s stepchildren, which gave support to the claimant’s application to enjoin the intended publication of naked photographs depicting him. The judge made clear that the potentially “grave risk” of the children “being subjected to teasing or ridicule at school” which might be “seriously damaging” to their relationship with the claimant would, if all other matters had

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67 AAA was a claim for misuse of private information brought by a young child (as the primary claimant, not a third party). The High Court noted that the authorities cited in K required weight to be attached to the best interests of the child. However, “the case was not conducted as a ‘best interests of the child’ hearing” (at [114]) and the court received no detailed evidence on the child’s best interests. Nevertheless, the judge’s explicit indication that “I attach considerable weight to the claimant’s interests” was deemed sufficient by the Court of Appeal ([2013] EWCA Civ 554, [18]) to discharge the “best interests” obligation. This approach avoids the need for extended evidence by treating the judge’s assessment of the balance to be struck between Arts.8 and 10 as akin to an exercise of discretion.

68 [2013] EWHC 24 (Ch) [unreported]
been equally balanced, have been “sufficient to tip it in the claimant’s favour.”\(^6^9\) Clearly, then, unless the courts make a U-turn, third party interests are going to remain a core feature of privacy litigation in the years ahead.

There are two ways in which the accommodation of third party interests in this manner might plausibly be explained. Both of these, however, cast serious doubt upon the success of the Wainwright ruling’s attempts to ensure the maintenance of legal certainty in later cases. We will now consider each of these alternatives in turn.

**The “incremental accommodation” theory**

It need not follow from the analysis offered above that the courts are formally precluded from translating the obligation to accommodate the interests of all those persons whose Convention rights are engaged (present in vertical cases) to horizontal cases. Nor need it follow that the courts ought not to engage in such translation. Indeed, it is not the aim of this essay to provide an answer to the large normative issue of whether such translation is desirable. Rather the essay’s primary concern is with the developmental dynamic present in this area. For what we have identified is a development of the law and not the mere application of established doctrine. We have, moreover, seen that such a move is neither obviously well-established nor conceptually straightforward. Yet the accommodation of third party interests might be defensible as an incremental extension of the MPI tort’s scope, aimed at securing the Convention rights of members of the claimant’s family who would be adversely affected by publication of the relevant private information. However, doing so is more problematic than the courts appear to have realised, and raises several issues.

First, it must be asked whether the extension of the balancing test to accommodate third party interests can properly be characterised as an “incremental” step. Second, the tension between the courts’ obligations under the HRA must be explored. On the one hand, the courts are required to act compatibly with the Convention rights of those affected and, on the other, to do so through the mechanism of the (traditionally bilateral) private law structure. Third, the fact that judges such as Eady J have clearly thought this development to be “well established” challenges the notion that the courts are consciously engaging in incremental extension; this will need to be addressed.

Incrementalism is not a term with a universally agreed meaning.\(^7^0\) Indeed, it is often used rather casually, as shorthand for the manner in which the common law develops as a body of what Llewellyn termed “slow-growing wisdom”.\(^7^1\) In domestic cases involving ECHR rights, however, incrementalism takes place within a field demarcated by the indirect horizontal effect of the Human Rights Act. One of the side-effects of this indirect horizontality is that it creates an adjudicative space within which tensions may arise between different aspects of

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\(^6^9\) ibid., [37]-[39]

\(^7^0\) As a method for judicial development of the common law, “incrementalism” entered into the popular legal lexicon in Brennan J’s judgment in the Australian High Court negligence case of *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 in which he stated: “It is preferable … that the law should develop novel categories of negligence incrementally and by analogy with existing categories, rather than by massive extension of a prima facie duty of care…” (at 481). This approach to developing the law pertaining to duties of care in negligence, whilst ultimately rejected in Australia, was endorsed in England by the House of Lords in *Caparo v Dickman* [1990] 2 AC 605.

\(^7^1\) Karl N Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School* (OUP 2008), 41
On the one hand, the court is required, as a public body under s.6 of the HRA, not to act incompatibly with Convention rights. As such, it must plug domestic gaps in protection for Convention rights by elaborating the common law in a way that is Convention-compatible. Yet because the obligation is to develop the common law (and not to give effect to a direct, statutory cause of action), there remain limits on how far the court is obliged to go in pursuit of Convention-compatibility. Phillipson and Williams argue that the court is limited by an existing common law constraint to extend the law on a merely incremental basis. They do not exhaustively define “incremental” in their piece, but the authors have in mind “a piecemeal and principled [mode of development] that takes due account of pre-existing legal frameworks established by Parliament and previous judicial decisions.” They approve of an argument made by Aileen Kavanagh that, acting incrementally, the courts are limited to engage only in partial and piecemeal reform … by extending existing doctrines, adjusting them to changing circumstances or introducing small alterations to avoid an injustice in their application.

Given the apparent centrality of “incrementalism” to indirect horizontal effect, Dolding and Mullender’s more detailed work on the concept is illuminating. In their view, the term broadly refers to a form of adjudication involving the articulation of liability rules which are, at once, new (and, hence, can properly be regarded as the fruit of judicial law-making) and yet are conditioned by pre-existing law.

Dolding and Mullender present two modes of incrementalism which they term “narrow” and “wide”. Both, they argue, can be shown to have been utilised in English tort law in the 20th century. Narrow incrementalism “reduces receptivity to strongly novel claims”. If, in a novel case, there is a lack of existing case law indicating a rule capable of extension to embrace the novel fact pattern, narrow incrementalism denies any opportunity for extending the law. Thus it tends to result in the courts “refus[ing] … to contemplate” elaborating the law in novel situations; in a novel tort case, liability will only be imposed if a sufficiently “tight” analogy can be drawn with an existing case.

By contrast, the wide incremental approach gives the courts considerably greater latitude in instances where existing doctrine is constraining. For a court operating in the wide incremental mode is less doctrine-bound than one operating in the narrow mode. Rather than focusing on establishing “tight analogies” between existing precedent and the instant

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72 On the concept of adjudicative space, see Richard Mullender, “Judging and Jurisprudence in the USA” (2012) 75(5) MLR 914, 921-923.

73 See generally Alison Young, “Mapping Horizontal Effect” in Hoffman (n 31).

74 Gavin Phillipson and Alexander Williams, “Horizontal Effect and the Constitutional Constraint” (2011) 74(6) MLR 878, 887


77 ibid, 13

78 ibid, 13


80 Dolding and Mullender, (n 76), 16.
case, a court engaged in the practice of wide incrementalism focuses on the underlying principles and purposes of the body of law being mobilised. Thus, for instance, wide incrementalism might lead to the creation of a new category of tort (to plug a gap in, for example, rights protection) in order to give effect to that body of law’s overarching, informing, “protective” purpose.

Despite not exhaustively defining incrementalism, the impression one gets from Phillipson and Williams’ endorsement of Kavanagh’s characterisation of it as involving “partial and piecemeal reform” suggests they see incrementalism in a manner consistent with the narrow mode. However, there is nothing in their argument that rules out the wide form of incrementalism; all their argument requires is that the courts do not exceed the limits of incrementalism howsoever it is defined in the law. Both the narrow and wide forms are evident in recent law (as Dolding and Mullender demonstrate) and thus both have clearly been seen as acceptable forms of judicial activity by the courts. Moreover, as Phillipson and Williams ultimately concede, the proper limits of incrementalism – and thus of judicial activism – are and must be set by the courts themselves. This is surely correct; the normative field within which judging takes place is one of “interpretative possibility” and, if judging is understood as an interpretative practice, it falls to the judges to interpret the limits of incrementalism.

The effect of the third party cases is not as far-reaching as the establishment of a novel tort. However, given that third party interests had previously been shown to be relevant to rights-balancing only in vertical and procedurally horizontal cases, their introduction in remedial horizontal cases cannot be said to be the result of tight analogising. A more significant move has taken place. The developmental mode that underpins the recognition of third party interests as relevant in MPI thus sits between the narrow and wide extremes Dolding and Mullender identify (although probably a little closer to the “wide” end of the scale). It is, however, impeccably “incremental”.

Seen in the light of the foregoing, the real problem with the third party interests cases upon which we have dwelt is that the courts have consistently failed to identify what they have been doing as development of the law. Instead we have been presented with numerous assertions to the effect that recognising third party interests as relevant is “well established”, which it clearly is not (or, at least, was not prior to these cases). The obfuscation is unnecessary. The courts are well within their constitutional limits developing the law in this fashion. For tort has a protective purpose and, moreover, the courts are able to point to relevant (though not directly related) higher-order public law values (in the form of the values underpinning Article 8) that provide normative support for development in a rights-protecting direction.

A better way to deal with these cases would have been to acknowledge the novelty of the issue raised and explain, in the language of indirect horizontality, why recognising third party interests as relevant is appropriate. In doing so, the courts could have acknowledged the tension between the traditionally bilateral structure of the type of claim (a tort claim) that is

81 ibid, 16
82 ibid, 14
83 Dolding and Mullender, (n 76), 15-17
84 Phillipson and Williams, (n 74), 906-907
85 Mullender, “Judging”, (n 72), 921.
86 On tort’s protective purpose, see Dolding and Mullender (n 76) at 13-14.
the vehicle through which privacy violations find redress, and the courts’ statutory obligation to develop the common law in a way that secures Convention rights. The courts could then have explored the limits of incrementalism and determined that the level of violence done to the traditional structure of the tort claim is less significant than the gap in protection for the Article 8 rights of the children. They could thus have concluded that bringing these interests into focus is permissible. Moreover, since they come into play only at the balancing stage, when the named claimant has already established that he himself has a reasonable expectation of privacy, the alteration to the structure of the claim is relatively minor (although, of course, it has significant consequences for the parties, and particularly for the defendant).

If the incremental accommodation model is correct, then one further matter ought to be raised. What we have unearthed is a consequence of indirect horizontality that none of the voluminous literature on horizontal effect, which sprang up in the aftermath of the HRA’s passing, considered. The consequence is that the Act may embolden the courts, in their pursuit of Convention-compatible development of the common law, to rework the *very structure* of the traditional private law claim. The incremental accommodation model shows this to be a defensible development, and it may be one that, in *practice*, makes only a relatively modest difference to the lives of litigants and their families. But at a *conceptual* level, it is deeply significant. Although the horizontality literature generally skirts over, around and otherwise avoids the question of *precisely* how far the courts can or must go in their development of the common law under the auspices of the HRA, the mantra that private law would be the mechanism through which Convention rights would find expression quickly took hold in the mid-2000s. What was not considered was whether the very bilateral structure of private law might itself be altered.

For if it can be so altered there is no reason to suppose this need be limited to claims in the relatively niche tort of MPI. The HRA’s horizontality obligations under s.6 are of general effect. Third party children’s Convention rights might be engaged in a range of other instances. For example, in the case of *Dobson v Thames Water* (a case in the tort of private nuisance), the Court of Appeal rejected an argument that the child of two claimants ought also to have been awarded his own, separate damages to protect his Article 8 interests. The rationale for the rejection was the oft-cited rule that, in order to bring a claim in private nuisance, the claimant must have a proprietary interest in the property that is subject to the nuisance. However, this rule simply reflects and maintains the traditional bilateral structure of nuisance claims. Under the incremental accommodation model, the interests of others living at the claimants’ property ought to be taken into account at some stage, even if they do not have a separate claim. In private nuisance, this accommodation could take place during the “reasonable use” element of the tort, when the court considers the reasonableness of the defendant’s conduct in creating the nuisance (ie after the establishment of a *prima facie* case, like the balancing test in MPI). The point is this: if third party interests are in play in MPI

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87 Lord Bingham cautioned against doing “impermissible violence” to “the principles upon which [an existing] cause of action is founded” in the name of pursuing protection for privacy in response to criticism of the Court of Appeal’s decision in *Kaye v Robertson* (1991) FSR 62 (for which he was one of the judges). In that case, neither the plaintiff’s counsel nor the court considered the law of confidence sufficiently malleable to accommodate *Kaye*’s claim: “the complaint in this case was not that information obtained or imparted in confidence was about to be misused, but that Mr Kaye’s privacy had been the subject of a monstrous invasion but for which the [information] would never have been obtained at all.” See Thomas Bingham, “Should there be a law to protect rights of personal privacy?” [1996] 5 EHRLR 450, 457.


89 This long-standing rule was reiterated by the House of Lords in *Hunter v Canary Wharf Ltd* [1997] AC 655; [1997] 2 WLR 684.
owing to the courts’ HRA obligations, there is no reason why they ought not also to be in play in other areas of private law when Convention rights are at stake. This observation is clearly in need of more analysis and discussion than can be provided in this essay (which, in any event, is concerned only with MPI), but it is flagged up here in the hopes of sparking such discussion and, at the very least, highlighting the existence of the issue.

The “inseparability” theory

An alternative to the incremental accommodation approach may be termed the “inseparability” theory. This theory would see the accommodation of the interests of claimants’ children in a rather different light. Instead of separating the children’s interests from those of the parent, we might see the courts as having gleaned from Article 8 a broader right to “family life”, and made that central to MPI claims. According to this, the children’s right is inseparable from that of the parent. This is a concept more familiar to family lawyers than tort lawyers. It relates to something more than merely an individual’s privacy: a broader right to respect for the integrity of the family unit. It is, of course, a right far more wide-ranging and further-reaching than the limited right to control of personal information secured through MPI as traditionally conceived (as a tort guarding against the disclosure of private facts).90

What this theory proposes is that the collective interest in family integrity, in which each family member has a stake, is the main interest in play in the cases upon which we have dwelt. If this is correct, then the children would not properly be seen as third parties at all; rather they are further members of a class whose collective interest in family life is threatened. According to this theory, the parent bringing the action is the sole primary party in name only; he is the token claimant representing the collective family interest.

There is evidence that the courts are prepared to conceive of Article 8 as bestowing this sort of broader interest. In Beoku-Betts, Baroness Hale seemed to have this sort of interest in mind; it will be recalled that she saw the “right to respect for family life of one [as] necessarily encompass[ing] the right to respect for the family life of others … with whom that family life is enjoyed.”91 The theory might also explain the refusal, in Dobson, to grant the claimants’ son damages for nuisance in his own right; interference with the parents’ rights (for which damages were awarded) could be seen as inseparable from interference with the son’s.92 Such a move would embrace the ECtHR’s insistence that Article 8 guarantees a broad right to “physical and psychological integrity”.93

As a solution to the third party interests question, however, this theory is problematic. For if this broad aspect of Article 8 is the central right in play, the nomenclature “misuse of private information” becomes rather misleading. The claimant’s claim is not simply that his private information has been misused, but that the defendant has caused harm to the integrity of his family unit. What the courts would have in substance recognised is a broad tort of disrupting family integrity. It would “convert the tort of MPI into a tort which affects the private life of the claimant.”94 The recognition of such a broad right as underpinning this sort of claim in tort is likely to encounter strong resistance. For, as Kay puts it, there are “few grievances that

90 Patrick O’Callaghan, Refining Privacy in Tort Law (Springer 2013) 154-155.
91 Beoku-Betts, (n 51) [4]
92 Dobson, (n 88)
93 Von Hannover v Germany (No.1) (2004) 40 EHRR 1 at [50]
94 O v A (previously OPO v MLA) [2014] EWCA Civ 1277, [2015] EMLR 4, [43]
cannot be accommodated to a claim of interference with this kind of interest.” He cautions that

... should [such a broad interest] govern private relations we could, effectively, have a situation where the Convention obliges every person to respect every other person's “physical and psychological integrity” – except when, all things considered, it is better not to do so.

Moreover, if the inseparability theory provides the correct answer, then there must have been been a significant amount of judicial sleight of hand in recent years, much of which seems to have gone unnoticed. For if the MPI tort has been converted into a tort of wrongful interference with the integrity of the family unit without anyone other than a handful of judges and practitioners who regularly deal with cases of this sort noticing, that alone is a testament to how unforeseeable such a development was.

This theory, then, is more radical than the incremental accommodation model. Indeed, it is so radical that it would fit with an understanding of the HRA’s horizontal effect that Phillipson and Williams labelled the “radical distortion” model. That model, which they reject outright as an implausible reading of the HRA’s effect, would require the courts “to distort existing causes of action in order to bring them into line with the Convention.” As they rightly argue, the model is incoherent; despite its ostensible formal constraints, it is virtually unconstrained in substance:

in imposing an absolute obligation to render existing causes of action Convention-compatible, [the radical distortion model] seems to require the courts simply to over-write existing actions with new Convention-based content.

In other words, it is one thing to incrementally alter the structure of a tort claim in order to accommodate Convention rights that would otherwise be overlooked, as in the incremental accommodation model. It is quite another to suggest that the HRA requires the courts to recognise a broad-brush Article 8 tort. Indeed, fears of such a “blockbuster” tort were, in part, what seemed to move the House of Lords in Wainwright to reject a general privacy tort so emphatically.

There is one further problematic aspect to this theory. Whilst it endeavours to explain away the practical effect that this line of cases has upon the claimant (that the parent’s claim is bolstered by the rights of the children) it serves only to highlight the disparity with the

96 ibid, 477
98 Phillipson and Williams, (n 74) 884
99 ibid, 885
100 Wainwright (n 5). See also NA Moreham, “Privacy in the common law: a doctrinal and theoretical analysis” (2005) 121 LQR 628, 654, and Gavin Phillipson, “Privacy” in Hoffman, (n 31), 163.
reverse position. For if the theory is correct, and the children’s right is inseparable from the parent’s right, it ought to be possible for the children to be the named claimants and draw upon the adverse effect upon the parent to bolster their claim for injunctive relief. But the courts have clearly rejected the notion that the children may bring a claim in such circumstances. The Court of Appeal’s ruling in O v A emphatically rejected (albeit providing only limited detail on the reasons for that rejection\textsuperscript{101}) the argument that an MPI claim could be brought by any person other than the subject of the information himself. That case, which is the most recent authority on this point,\textsuperscript{102} thus sits squarely at odds with the inseparability theory.

As such, whilst some might take the references to Baroness Hale’s characterisation of the Article 8 rights of the family as a collective interest from Beoku-Betts as indicative of the inseparability theory’s presence in this area, the model is too incoherent plausibly to explain the emergence of this line of cases (or, indeed, to inform its future development). Moreover, it is likely to generate considerable resistance once its implications are fully appreciated.

**Conclusions**

The methodology adopted in both CDE and K calls into question anew the way in which horizontal rights-protection operates in England. Under any form of indirect horizontal effect (a notion around which there is broad consensus), human rights claims are dealt with through the common law, using (and if need be, incrementally developing) existing private law actions. This may even result on occasion, as with misuse of private information in Campbell, in the emergence of an apparently novel tort. But since the medium through which such claims are to be disposed of remains, resolutely, domestic private law, it seems extraordinary (at first glance) to see these very specific third party interests featuring at all in these cases. For private law claims (in, *inter alia*, tort, equity and contract) are normally by their very nature bilateral. A claimant is not traditionally able to bolster his claim by seeking to draw the court’s attention to other, unrepresented parties who might be adversely affected should he lose. Keeping the child’s claim separate from the parent’s preserves the traditionally clear, bilateral nature of private law litigation.

As we saw in Dobson, the courts have taken a different stance in the tort of private nuisance, despite being under the same HRA obligations. It thus appears that the development of misuse of private information in such a way as to take into account third party interests creates an imbalance between privacy law and other causes of action in which Convention rights are at stake. The imbalance is methodological, in that the courts have adapted their method to embrace a broad-ranging balancing act only in these informational privacy cases, preferring to keep other torts strictly bilateral. There are always reasons to suspect that such

\textsuperscript{101} In O v A (n 94), the appellant (claimant), who was the child of the respondent, presented an argument that his claim in MPI should be allowed along the lines of the inseparability theory (at [40]-[42]). The Court of Appeal rejected this (at [45]), preferring the respondent’s submission that “in *K v News Group Newspapers Ltd* the children could not have made their complaint separately and that there is no case in which third parties have been able to bring an action which does not relate to them or in respect of information which they do not own” (at [43]). Moreover, the Court implicitly endorsed the respondent’s caution that “[t]he appellant is trying to convert the tort of MPI into a tort which affects the private life of the claimant” (at [43]), since if the law went “that far … the result would be that a person could sue whenever his family life was affected even if the information does not belong to him” (at [45]).

\textsuperscript{102} The Supreme Court, when it gave judgment in Rhodes v OPO [2015] UKSC 32 (the appeal from O v A) mentioned but did not comment upon the correctness of the Court of Appeal’s treatment of the MPI claim, which was not an issue in the appeal to the SC.
methodological imbalances within the law are undesirable, not least because insofar as they result from judicial elaboration of the law, they are both retrospective (upon the instant case) and difficult accurately to foresee. Moreover, since the doctrinal underpinning for this development is both weak and not fully agreed-upon by the courts, there is a sense that it may lack a clear basis in legal principle. The lack of clarity as to the normative basis for taking into account third party interests exacerbates the issue. These problems raise significant rule of law concerns and, most importantly for the argument made in this essay, they undermine the attempt to engender certainty in privacy law’s future development from the restrictive Wainwright ruling.

There is, of course, a sense in which the conclusions reached by Eady J in CDE and Ward LJ in K are commendable. Their willingness to take seriously the interests of children affected by the violation of their parents’ privacy is morally appealing. But the methodologies leading to these conclusions raise considerable problems of coherence (not least with each other) which require much more work to sort out than appears to have been appreciated. Given that the decisions cannot reasonably be said to apply existing doctrine formalistically, they do not represent the kind of predictable, narrowly incremental elaborations of the law that Lord Hoffmann seemingly (perhaps naïvely) envisaged would follow Wainwright.

As such, larger questions must be raised about the legacy of Wainwright. For what we have uncovered in this essay is evidence that, in one aspect of misuse of private information jurisprudence, the law has been significantly stretched in order to accommodate third party interests which ordinarily would play no role in private law methodology. There are other aspects of this body of case law which provide further evidence of this judicial tinkering, such as the timid emergence of a doctrine of “false privacy”, and what some commentators have suggested may be in substance (if not form) the recognition of a right in one’s own image. It may well thus be the case that judges have in fact responded to the apparent limiting effect of Wainwright and Campbell by fashioning ways of broadening privacy protection (particularly for children) on a rather ad hoc basis whilst obscuring their moves by engaging in a process of ostensibly formal, ex post facto rationalisation of their decisions. And whilst the noble aim motivating this is no bad thing in itself, it demonstrably leaves the law in this field in a state of considerable uncertainty.

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