UNIVERSITY OF WEST LONDON
The Career University

UWL REPOSITORY

repository.uwl.ac.uk

Hulk Hogan and the demise of Gawker Media: wrestling with problems of celebrity voyeurism, newsworthiness and tabloidisation

Antoniou, Alexandros ORCID logoORCID: https://orcid.org/0000-0002-4249-0939 and Akrivos, Dimitris (2016) Hulk Hogan and the demise of Gawker Media: wrestling with problems of celebrity voyeurism, newsworthiness and tabloidisation. Journal of Media Law, 8 (2). pp. 153-172. ISSN 1757-7632

http://dx.doi.org/10.1080/17577632.2016.1253909

This is the Accepted Version of the final output.

UWL repository link: https://repository.uwl.ac.uk/id/eprint/3022/

Alternative formats: If you require this document in an alternative format, please contact: open.research@uwl.ac.uk

Copyright:

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy: If you believe that this document breaches copyright, please contact us at open.research@uwl.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.

Rights Retention Statement:

Manuscript title:

Hulk Hogan and the Demise of Gawker Media: Wrestling with Problems of Celebrity Voyeurism, Newsworthiness and Tabloidisation

Re-submission date:

October 21st, 2016

Corresponding author:
Dr. Alexandros K. Antoniou
Lecturer in Criminology
Ealing Law School
University of West London
St Mary's Road, Ealing
London W5 5RF
T 0208 231 2951
E Alexandros.Antoniou@uwl.ac.uk

Co-author:
Dr. Dimitris Akrivos
Lecturer in Criminology
Canterbury Christ Church University
School of Law, Criminal Justice & Computing
Canterbury Christ Church University
North Holmes Road
Canterbury Kent CT1 1QU
E dimitris.akrivos@canterbury.ac.uk

ACCEPTED

Abstract

The article uses the private-facts lawsuit of the retired wrestler Hulk Hogan against Gawker Media as a case study to look at the challenges of balancing the media's freedom of expression and individuals' privacy in the contemporary celebrity-centred culture. It suggests that the verdict in the privacy suit reflects the jurors' profound disenchantment with the way in which freedom of expression was subverted in this case by the media organisation. It further adopts a comparative perspective that draws parallels and highlights differences between American and English privacy law. It explores Hogan's claim through the lens of the emerging English privacy jurisprudence and identifies important lessons to be learnt for the future of the newly developed tort of misuse of private information.

Keywords: privacy, celebrities, public interest, exemplary damages

Introduction

We live in a media-saturated, celebrity-centred world, where 'media personalities' like Kim Kardashian can easily 'break the Internet' (as the caption of her 2014 Paper magazine cover photo stated) by doing nothing more than showing their bare behind or uploading a new 'selfie.'[1] Due to the high level of media penetration in our everyday lives, it is no longer as easy for contemporary celebrities to control their image as it was in the past. As a result, these few individuals often find themselves exposed to the ever-watching, voyeuristic gaze of the many - what Mathiesen calls 'synopticism.'[2] The public seems to be fascinated by the ordinary/extraordinary paradox,[3] constantly trying to discover the flawed 'reality' behind the ostensibly perfect lives of stars, be it body imperfections, drug addiction, adultery, sex parties, shoplifting or other 'ordinary' problems. Such problems offer an interesting mixture of 'high lives' and 'low lives,' and often feature in news stories produced for the mass consumption of unexceptional 'mid-lives.'[4] Responding to the demands of the market and in order to give the public what it wants,[5] media professionals dedicate more and more time and space to such stories and consider them very newsworthy. This has led to a shift of media focus from information to entertainment (or 'infotainment') and an overall trivialisation of media content through a process of 'tabloidisation.'[6] This tabloidisation raises questions as to whether the media's access to celebrities' lives is without limits and ultimately as to whether information that is in the public interest to know is the same as what interests the public in a voyeuristic sense. The study of Hulk Hogan's case against Gawker Media suggests that the answer to both these questions should be negative.

The retired professional wrestler Terry Bollea – better known by his ring name Hulk Hogan – successfully sued Gawker Media after it disclosed a 101-second video which featured Hogan engaging in sexual activity with a female companion. The ten-day trial in Pinellas County Circuit Court, which resulted in the award of damages of US$140 million (£97.3m), was followed closely by free speech experts and privacy advocates. It also attracted significant

[1] Tim Delaney and Tim Madigan, *Lessons Learned from Popular Culture* (SUNY Press 2016).
[2] Thomas Mathiesen, 'The Viewer Society' (1997) 1(2) *Theoretical Criminology* 215.
[3] Richard Dyer, *Stars* (British Film Institute 1979).
[4] Gregg Barak, 'Media, Society and Criminology' in Gregg Barak (ed), *Media, Process, and the Social Construction of Crime* (Garland 1994) 23.
[5] Leo Bogart, *Commercial Culture: The Media System and the Public Interest* (OUP 1995).
[6] Graeme Turner, *Understanding Celebrity* (Sage 2004).

ACCEPTED

media attention around the world. Gawker is an American-based news website known for its aggressive celebrity journalism. Its chequered 12-year-old digital history is interwoven with scoops of questionable public interest; from Tom Cruise's infamous Scientology recruitment video to the footage of the former Toronto mayor Rob Ford smoking crack and the post about a married Condé Nast executive attempting to hire a gay porn star for sex. The outcome in Hogan's case was unusual not only because claimants in public disclosure cases rarely win such suits,[7] but also because Hogan won with an atypical and sizeable margin of victory.

The basis of Hogan's claim was the private-facts tort, which concerns the publication of true, yet highly offensive and embarrassing, private information that is 'not newsworthy.'[8] There is a very important disparity between the legal and media definitions of 'newsworthiness' that needs to be emphasised here: the narrower legal definition refers only to information that is in the public interest to report, while the broader media definition essentially involves any information deserving to make news for being likely to attract the public's attention (irrespective of whether it serves the public interest or not).[9] There also seems to be a difference in the way courts approach newsworthiness in the two sides of the Atlantic, with the First Amendment definition of newsworthiness in the US allowing a broader interpretation of what is in the public interest (compared to England) and, as discussed later, largely incorporating its non-legal sense.[10]

The key issues that arose at Gawker's trial were whether the publication of a video excerpt revealing salacious details about Hogan's sexual escapades was newsworthy under Florida law, and if so, whether it met a threshold of newsworthiness high enough to override the claimant's right to privacy. Hogan's case deserves academic attention not only because it is one of the few in which claimants surmounted the obstacle of newsworthiness but also because it has helped clarify to some extent the vaguely demarcated boundaries between newsworthiness and privacy in the digital era.

Background: the competing claims

Mr. Hogan sued Gawker Media, its majority-stake owner and founder Nick Denton as well as the then editor A.J. Daulerio for publishing private facts after a short clip from a 30-minute sex tape - received from an anonymous source - was posted in October 2012 on their gossip news website. The footage portrayed Hogan engaging in a sexual encounter with his then best friend's wife, Heather Clem. Hogan initially filed a copyright infringement claim in Florida federal court and later sued in Florida state court[11] for US$100 million in damages, asserting

[7] Samantha Barbas, 'Saving Privacy from History' (2012) 61(4) *DePaul Law Review* 973; Samantha Barbas, 'The Death of the Public Disclosure Tort: A Historical Perspective' (2010) 22(2) *Yale Journal of Law & the Humanities* 171; Daniel L Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort' 1983 68(3) *Cornell Law Review* 291.

[8] 'Hulk Hogan Weeps as Jury Awards Him £80m in Sex Tape Case' (*Media Lawyer*, 21 March 2016) <http://medialawyer.press.net/article.jsp?id=11495756> accessed 21 March 2016; Columbia Global Freedom of Expression, 'Hogan v Gawker' (*Columbia University*, 18 March 2016) <https://globalfreedomofexpression.columbia.edu/cases/hogan-v-gawker/> accessed 20 October 2016.

[9] Sandi Towers-Romero, *Media and Entertainment Law* (Delmar Cengage Learning 2009); Yvonne Jewkes, *Media and Crime* (3rd edn, Sage 2015).

[10] Robert Balin and Yuli Takatsuki, '"You say tomato…": A Comparison of English and US Privacy Law Principles' in James Lewis and Paul Crick (eds), *Media Law and Ethics in the 21st Century: Protecting Free Express and Curbing Abuses* (Palgrave Macmillan 2014) 144; Kirsty Hughes and Neil Richards, 'The Atlantic divide on privacy and free speech' in Andrew Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP 2016) 196.

[11] For the procedural history of the case, see Columbia Global Freedom of Expression (n 8).

ACCEPTED

invasion of his privacy through the unauthorised public disclosure of highly offensive private facts.

Gawker claimed that the US Constitution protected the media's right to publish legitimate news stories, despite their objectionable content. Its defence was that the information published was first, truthful, and second, newsworthy given the claimant's celebrity status and previous media reports about the existence of the tape. It was maintained that Hogan's private life and sexual exploits were 'consistently'[12] being made available for public consumption as part of his public persona. It was rather unclear, according to the defence, which persona the claimant had adopted at the time of the recording: Hulk Hogan, i.e. his public persona, or Terry Bollea, i.e. his private one. Gawker's lawyers pointed out that news of the recording had first been published on two websites ('TMZ' and 'The Dirty') and that Hogan had made appearances on television programmes to talk about it.[13] They downplayed the impact of the video, stating that it revealed nothing about Hogan that he had not previously put in the public domain by his own words and actions.

Hogan's lawyers refuted the claim that the video was newsworthy and argued that the sole reason behind the posting of the clip was a quest for eyeballs 'after a five-month news "dry spell".'[14] They stated that Hogan did not consent to the activity being recorded and emphasised throughout the trial the emotional distress of 'outrageous intensity and duration'[15] caused to their client by the exposure. Kenneth Turkel, a lawyer for Hogan, asserted that Gawker editors had not even had the 'common decency'[16] to follow usual journalism procedures and contact Hogan before posting the video in question. Nor did the website contact the woman appearing in it or her husband, a radio personality (known as DJ Bubba 'the Love Sponge' Clem) who reportedly recorded the activity.

The jury apparently rejected Gawker's arguments that the video in question contained news that were protected by the Constitution. Although it is impossible to know the basis of their verdict, it likely that they took the view that the claimant had a reasonable expectation of privacy for conduct of an intimate and sexual nature, despite his celebrity status and previous ostentatious invitations into his sexual exploits. Therefore, publishing a sex tape of that person without his consent amounted to an interference with his privacy. The claimant's legal team welcomed the case outcome as a victory for anyone who has been 'victimised by tabloid journalism'[17] and stated that the jury's verdict represented 'the public's disgust'[18] with the invasion of privacy 'disguised as journalism.'[19]

ACCEPTED

[12] Media Lawyer (n 8); see also Columbia Global Freedom of Expression (n 8).
[13] 'Hulk Hogan Weeps as Jury Awards Him £115m in Sex Tape Lawsuit' (*Irish Examiner*, 19 March 2016) <http://www.irishexaminer.com/breakingnews/entertainment/hulk-hogan-weeps-as-jury-awards-him-115m-in-sex-tape-lawsuit-725944.html> accessed 20 March 2016.
[14] Edward Helmore and Nicky Woolf, 'Hulk Hogan Awarded $115m in Gawker Sex Tape Lawsuit' *The Guardian* (London, 19 March 2016) 26.
[15] ibid.
[16] ibid.
[17] 'Hogan in Line to Top "Pounds 100m"' *Daily Star Sunday* (London, 20 Mar 2016) 4.
[18] Media Lawyer (n 8); Helmore and Woolf, *The Guardian* (n 14).
[19] ibid.

Celebrities, newsworthiness and the public interest

The tort of public disclosure of private facts is 'a civil cause of action redressing the widespread dissemination of truthful, but shameful, personal information.'[20] Under the law in Florida, the Restatement (Second) of Torts Section 652D (1977) provides: 'one who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicised is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.' The US Court of Appeals for the Second Circuit held in *Sidis v FR Publishing Corp* (1940)[21] that the private-facts civil wrong consists in revelations of information that is 'so intimate' and 'so unwarranted' as to 'outrage the community's notions of decency.' Some additional guidance on the nature of personal matters that could give rise to potential liability if subjected to public view is provided by the Florida Bar. These include a person's sexual relationships; the contents of intimate and personal letters or income tax returns; family quarrels; humiliating illnesses; photographs taken in private places or stolen from a person's home.[22] Offensiveness is a matter for the jury to consider and as a result the answer to the question of what amounts to a highly offensive revelation of private facts can vary between communities.

Successful private-facts claimants sue for the 'shame, humiliation and mental anguish'[23] which the unauthorised publication of intensely personal information has caused them. Truth cannot defeat a private-facts claim and therefore Gawker's argument that Bollea and Clem actually engaged in sexual intercourse as the video demonstrated is immaterial. Truthful accounts can still form the basis of a legal action if they concern highly offensive details which are not of legitimate public concern. However, the highly offensive treatment of the claimant will not mean that the news media is liable, if it can be shown that the material is of legitimate public concern.[24] The mere fact that a matter has been published does not necessarily indicate a legitimate concern on the public's part. An article may lack newsworthiness in the legal sense of the term despite its publication. The notions of 'newsworthiness' and 'matters of public concern' are not limited to elective or legislative politics.[25] Rather they refer to a wide range of material encompassing 'expression about philosophical, social, artistic, economic, literary, or ethical matters.'[26] Matters of public importance which are unlikely to be considered private and may be freely published include, according to the Florida Bar, a person's date of birth; the fact that a person is married; divorces; military record; admission to the practice of any trade or profession; occupational licences; pleadings filed in a lawsuit; official actions; arrest reports; police raids; homicide victims; suicides; accidents; fires; or natural disasters.[27] In cases concerning mass media disclosure of private information which has been lawfully acquired (e.g. it forms part of a

[20] Patricia Sánchez Abril, '"A Simple, Human Measure of Privacy": Public Disclosure of Private Facts in the World of Tiger Woods' (2011) 10(2) *Connecticut Public Interest Law Journal* 385, 385.
[21] *Sidis v FR Publishing Corp*, 113 F 2d 806, 809 (2d Cir 1940).
[22] John Bussian and Paul Levine, 'Invasion of Privacy and the Media: The Right "To Be Let Alone"' (*Florida Bar*, August 2004) <http://www.floridabar.org/divcom/pi/rhandbook01.nsf/1119bd38ae090a748525676f0053b606/dfc00ac22467b7f5852569cb004cbc2a!OpenDocument#Untitled%20Section_0> accessed 29 September 2016.
[23] Kent R Middleton, William E Lee and Daxton R Steward, *The Law of Public Communication* (9th edn, Routledge 2016) 175.
[24] Daniel J Solove and Paul M Schwartz, *Privacy and the Media* (Aspen Publishers 2008) 124.
[25] *Rosenbloom v Metromedia Inc*, 403 US 29, 41 (1971).
[26] *Abood v Detroit Board of Education*, 431 US 209 (1977).
[27] Bussian and Levine (n 22).

ACCEPTED

public record), matters of public importance cover all truthful information with the exception of that which would interfere with a 'state interest of the highest order.'[28] Whether the protection of individual privacy furthers an interest of the highest order is yet to be determined.

The elusive element of newsworthiness has been interpreted by the American courts to include 'the macabre, the hair-raising and the tasteless.'[29] Rather bizarrely, judges have found newsworthiness in revelations about frailties, peccadilloes or eccentricities in someone's character, as for example in *Virgil v Sports Illustrated Inc* (1976),[30] where disclosures of 'generally unflattering and perhaps embarrassing' habits of a famous surfer were justified as part of a 'legitimate journalistic attempt' to explain his style of body surfing. It may be suggested that such a standard does little to dispel the uneasiness and misunderstandings between matters of public concern and morbid or sensational matters which simply satisfy public curiosity. The requirement for establishing facts that are not of a legitimate public concern places on claimants a burden which is virtually insurmountable, thereby practically swallowing the public disclosure tort.

The determination of the issue of newsworthiness has been criticised as being 'a chicken-and-egg analysis that often results in courts deferring to the market-driven judgment of publishers,'[31] presumably to encourage uninhibited and wide open debate on public issues. In *Gilbert v Medical Economics Co* (1981), the US Court of Appeals for the Tenth Circuit held that liability for disclosure of private facts is limited to 'extreme' cases, 'thereby providing the breathing space needed by the press to properly exercise effective editorial judgment.'[32] The US Supreme Court has not thus far taken the opportunity to clarify under what circumstances privacy rights fade in the interests of newsworthiness. This is not, however, to suggest that there are no limits on truthful speech. Whether a matter is one of legitimate public concern, which is an evaluation that brings federal constitutional free speech consideration within the province of state tort law,[33] 'must be made on a case-by-case basis, considering the nature of the information and the public's legitimate interest in its disclosure.'[34]

In deciding newsworthiness, US courts may ask whether the information in question can be fairly considered as being 'a subject of general interest and of value and concern to the public.'[35] US courts generally see social value in topics related to public officials' activities, crimes, accidents, fires, police activity and entertainment events. The public interest hurdle was easily overcome in *Cinel v Connick* (1994),[36] where the US Court of Appeals for the

ACCEPTED

[28] Danielle Keats Citron, 'Mainstreaming Privacy Torts' (2010) 98(6) *California Law Review* 1805, 1829; see also *Florida Star v BJF*, 491 US 524 (1989).
[29] Middleton et al (n 23) 181.
[30] *Virgil v Sports Illustrated Inc*, 424 F Supp 1286, 1289 (SD Cal 1976).
[31] Patricia Sánchez Abril, 'Private Ordering: A Contractual Approach to Online Interpersonal Privacy' (2010) 45(3) *Wake Forest Law Review* 689, 697.
[32] *Gilbert v Medical Economics Co*, 665 F 2d 305, 308 (10th Cir 1981).
[33] Clay Calvert, 'Defining "Public Concern" After Snyder v Phelps: A Pliable Standard Mingles with News Media Complicity' (2012) 19(1) *Villanova Sports & Entertainment Law Journal* 39, 41; Dan B Dobbs, *The Law of Torts* (West Academic Publishing 2000) 39; Vincent R Johnson and Alan Gunn, *Studies in American Tort Law* (Carolina Academic Press 1994) 2.
[34] *American Jurisprudence: A Modern Comprehensive Text Statement of American Law, State and Federal* (2nd edn, Lawyers Co-operative 2011) para 187.
[35] *Snyder v Phelps et al,* 131 S Ct 1207, 1216 (2011).
[36] *Cinel v Connick*, 15 F 3d 1338 (1994).

Fifth Circuit found that the broadcast of sensational home-made child sexual abuse images belonging to a Roman Catholic priest did not amount to an invasion of his privacy because it was a matter of public concern and thus newsworthy. The extent to which a publication interferes with the subject's private life and the weight attached to the privacy interest breached by the media could also affect a court's opinion on the issue of newsworthiness. In *Virgil v Time Inc* (1975), the US Court of Appeals for the Ninth Circuit held that the line between legitimate public interest and invasion of privacy is to be drawn:

> […] when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.[37]

The fact that an individual voluntarily subjected themselves to the public spotlight can influence the courts' evaluation of the newsworthiness of a publication. The US Supreme Court has held in *Bartnicki v Copper* (2001) that one of the costs accompanying engagement in public affairs is 'an attendant loss of privacy.'[38] Whilst the courts are more likely to find that information about public officials is newsworthy, the involvement of a celebrity does not necessarily mean that the media are entitled to disclose every detail about the celebrity's life. In *Bret Michaels v IEG Inc* (1998),[39] the US District Court for the Central District of California found that the unauthorised disclosure of the infamous sex tape depicting actress Pamela Anderson and rock star Bret Michaels by an Internet video distributor was not newsworthy. Simply because Anderson had previously appeared nude in magazines and publicly distributed video-tapes did not make her real sex life a public matter. Likewise, Michaels had an interest in preventing his sex life from being exposed, notwithstanding the fact that he was a celebrity too. The Court explained that 'even people who voluntarily enter the public sphere retain a privacy interest in the most intimate details of their lives.' In a similar vein, it is likely that the jury in the Hogan case disagreed with Gawker's claims that Hogan had voluntarily relinquished his privacy expectation by boasting publicly about his conquests and sexual accomplishments. What is more, Hogan had not presented a false media image that needed correcting. Had he publicly projected himself as a monogamous person, then his hypocrisy might have been newsworthy.

What would the outcome be in England?

The general defence of newsworthiness, 'the touchstone of US law,'[40] does not apply in English law.[41] A key element of the English and European courts' analysis is, as will be seen, whether the story contributes to a debate of general interest, 'an analogous but by no means identical concept to the American idea of "matters of public concern".'[42] Hughes and Richards explain that 'public concern' or 'public interest' in the US can mean 'little more than a factual inquiry in practice, which sometimes boils down to whether the public is

[37] *Virgil v Time Inc*, 527 F 2d 1122, 1129 (1975).
[38] *Bartnicki v Copper*, 532 US 514, 533-34 (2001).
[39] *Bret Michaels v IEG Inc*, 5 F Supp 2d 823, 841-42 (CD Cal April 27th, 1998).
[40] Balin and Takatsuki (n 10) 145.
[41] See *Campbell v MGN Ltd* [2004] UKHL 22 [120] (Lord Hope): 'But it is not enough to deprive Miss Campbell of her right to privacy that she is a celebrity and that her private life is newsworthy.'
[42] Hughes and Richards (n 10) 196.

ACCEPTED

interested in a story.'[43] By contrast, the authors point out, 'numerous English cases under the Human Rights Act have protected privacy interests against press disclosure even when the facts alleged constituted front-page news.'[44] Public interest in England requires 'a more normative enquiry by the court.'[45] English judges use 'a balancing methodology'[46] which practically gives strong protection to even famous people's sex lives and photographs.

A tort of violation of privacy is not expressly recognised in English law.[47] However, as a result of a series of cases brought since 2001, it can be safely asserted that the English law protects to some extent an individual from unjustifiable intrusions into their private sphere through the tort of 'misuse of private information.'[48] This protection is partly based on the provisions of the Human Rights Act 1998, which incorporates the rights enshrined in the European Convention on Human Rights (ECHR) into domestic law. Privacy interests are recognised and protected by Article 8 of the Convention which guarantees a person's private and family life. The right, however, is not absolute. Where Article 8 clashes with Article 10, which protects freedom of expression, the competing Convention rights must be balanced. Likewise, Article 10 is a qualified right and as such it can be limited for the purposes of preventing the disclosure of information received in confidence and protecting the rights of others.

Claimants seeking damages in cases involving misuse of private information are required to establish that they had a reasonable expectation of privacy in the circumstances. If the court concludes that there was no such expectation, the claimant's case will collapse. If, however, this hurdle is overcome, the court must go on to consider whether it would be appropriate for the claimant's privacy interests to be overridden by the defendant's - usually the media's or the publisher's – right to freedom of expression under Article 10. It was established in *Ash & Anor v McKennitt & Ors* (2006) that neither Article has automatic priority over the other.[49] Whenever the values underlying the respective Articles conflict with each other, an 'intense focus is necessary upon the comparative importance of the specific rights being claimed.'[50]

When determining whether the claimant has a reasonable expectation of privacy, the English courts take account of various factors which are weighted up against each other. In *Murray v Big Pictures Ltd* (2008), the Court of Appeal stated:

> […] as we see it, it all depends upon 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.[51]

[43] ibid 196.
[44] ibid 164-5.
[45] ibid 196.
[46] ibid.
[47] *Wainright v Home Office* [2004] 2 AC 406 [31].
[48] *Campbell* (n 41) [14] (Lord Nicholls).
[49] [2006] EWCA Civ 1714.
[50] ibid [46] (Buxton LJ).
[51] [2008] EWCA Civ 446 [17]; see also [36].

ACCEPTED

Privacy cases require therefore a very fact-specific inquiry. Likewise, when determining whether speech is a matter of public concern, the American courts require the examination of the 'content, form and context' of the speech 'as revealed by the whole record'[52] and the weighing of competing values on a case-by-case basis.[53]

When is there a reasonable expectation of privacy?

In determining the ambit of an individual's private life, Lord Nichols stated in *Campbell v MGN Ltd* (2004) that 'the touchstone of private life is whether in respect of the disclosed acts the person in question had a reasonable expectation of privacy.'[54] Under English law, Mr Hogan would have little difficulty in persuading the court that the video disclosed fell within the category of private information. The English courts have made it clear that revelations about sexual activity are likely to give rise to a reasonable expectation of privacy so long as the activity involves consenting adults. In *Jagger v Darling* (2005),[55] the elder daughter of Mick Jagger successfully applied to the High Court for an injunction in order to restrain further publication of a CCTV footage which depicted her 'engaging in sexual activity'[56] with her boyfriend in an area 'just inside the closed door'[57] of a Soho nightclub. The defendant, who was at the time the manager of the club, took possession of the CCTV disk and passed it to the *News of the World* newspaper (NOTW). This was a situation where there was clearly a reasonable expectation of privacy, according to the court. The claimant may be said to have been guilty of misconduct in the most general sense, having realised that her conduct would be observed clearly or electronically recorded, but nevertheless Bell J found 'no legitimate public interest in further dissemination of the images which could serve only to humiliate the claimant for the prurient interest of others.'[58] In *CTB v News Group Newspapers (NGN)*[59] (2011), where the claimant footballer Ryan Giggs sought to continue an interim injunction restraining the defendant newspaper from revealing details of his sexual relationship with a Big Brother contestant, Eady J stated that there was 'no doubt'[60] that 'conduct of an intimate and sexual nature'[61] gave rise to a reasonable expectation of privacy.

The limited proposition established in the Hogan case - namely making publicly available a tape of a person having sex without that person's consent constitutes a breach of their privacy - is in line with *Mosley v NGN* (2008).[62] In this case, the claimant, the former President of the governing body of motor sport (Federation Internationale de l'Automobile), was secretly filmed whilst engaging in a sado-masochistic activity with prostitutes in a private flat. An edited version of the recording was published on the NGN website in connection with a NOTW article claiming that the participants' 'sick orgy' had a 'Nazi and concentration camp theme.' Eady J held that the claimant had a legitimate expectation of privacy with respect to sexual activities, albeit uncommon, that took place on private property between genuinely

[52] *Snyder v Phelps et al* (n 35) 1216), citing *City of San Diego v Roe* 125 S Ct 521 (2004).
[53] *Florida Star v BJF* (n 28).
[54] *Campbell* (n 41) [21].
[55] [2005] EWHC 863.
[56] ibid [6].
[57] ibid [7].
[58] ibid [14].
[59] [2011] EWHC 1232.
[60] ibid [23].
[61] ibid.
[62] [2008] EWHC 1777.

ACCEPTED

consenting adults - paid or unpaid.[63] He stated that public figures were entitled to a personal life and that people's sex lives were 'essentially their own business.'[64] The video taken of Mr. Hogan was not of an anodyne nature. It involved sexual activities between genuinely consenting adult participants which took place in an intensely private setting. There was no question of exploiting a vulnerable individual either. It seems therefore likely that there would be a reasonable expectation of privacy in these circumstances.

Gawker also claimed that Mr Hogan talked about the recording in television appearances he had previously made. This may suggest that the story was partially already in the public domain. In this case, however, this claim would be insufficient to tip the balance in favour of freedom of expression. The form of information through which the facts were disclosed (a moving image) was more vivid than written words and far more powerful in corroborating spoken words describing certain conduct.[65] Images, particularly if they have been taken without the subject's consent, are qualitatively different in their intrusiveness compared to words alone because they add to the impact of what words convey and so they are likely to give rise to an expectation of privacy. Moreover, the fact that news about the recording had been revealed to a number of people would not mean there could be no further intrusion on Mr Hogan's privacy by fresh revelations to different groups (in this case via a website).[66] In addition, the difference in intrusiveness between previous disclosures on the Internet and the 'media storm' that would be generated from publication in domestic newspapers, together with unrestricted coverage in their respective websites, would exacerbate Hogan's distress and this would be highly relevant in English law.[67] Finally, the context in which the images were taken is important in English law. As Baroness Hale stated in *Campbell*, no expectation of privacy is created in relation to images of someone, famous or not, doing ordinary things in a public space, or as she famously put it 'popping out to the shops for a bottle of milk.'[68] The issue of whether Hogan's sex video fell in the same category would not arise here by any stretch of the imagination.

Striking a balance

Where there is a legitimate expectation of privacy, the English courts must go on to ask whether there would be public interest in the revelation, to the extent that it is not already in the public domain, and whether publication would be considered to make a real contribution to 'a debate of general interest' – in the sense recognised by the European Court of Human Rights in *Von Hannover* (2004),[69] discussed below - which might outweigh the claimant's privacy rights.

Gawker would be expected to argue that the information disclosed by Hogan's sex tape was in the public interest due to the claimant's status as a public figure. However, although public

[63] ibid [98].
[64] ibid [100].
[65] *Douglas v Hello! Ltd* [2005] EWCA Civ 595 [84] - [91].
[66] *McKennitt & Ors v Ash & Purple Inc Press Ltd* [2005] EWHC 3003 [81].
[67] *PJS v NGN Ltd* [2016] EWSC 26 [35]; Tom Iverson, 'Landmark privacy ruling in the "celebrity threesome" case (2016) 27(6) *Entertainment Law Review* 202. See, however, Lord Toulson, dissenting, who took the view that 'the world of public information is interactive and indivisible' and where the information is widely disseminated, the medium and form of the publication, be it Internet, print or broadcast journalism, should not make a significant difference; at [89].
[68] *Campbell* (n 41) [154].
[69] *Von Hannover v Germany* (2004) 40 EHRR 1 [60].

ACCEPTED

figures 'must expect and accept' that their conduct will be 'more closely scrutinised' by the media,[70] it does not follow that public figure are not entitled to have their privacy respected in the appropriate circumstances. As Lord Philips MR observed in *Campbell*, 'the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media.'[71] In his testimony to the Leveson Inquiry into the NOTW phone-hacking scandal, actor Hugh Grant made a similar point, arguing that it is common for people working in show business and journalists to strike mutually beneficial bargains where the first get the opportunity to promote their forthcoming projects through their interviews and the second to boost their sales. However, such a bargain, he clarified, does not provide unlimited access to the individual's private life:

> Like any barter, when it's over, it's over. If I sell you a pint of milk for 50p, I would not expect you to come to me forever afterwards, saying, 'You slut, you sold me milk once. I can now help myself to your milk forever.' I would think you were mad.[72]

Moreover, in the seminal case of *Von Hannover*, the Strasbourg court held that everyone, including celebrities, had a legitimate expectation that their private lives would be protected and that the general public did not have a legitimate interest in knowing where Princess Caroline of Monaco was and how she behaved generally in her private life, even when she appeared in places which could not always be described as secluded.[73] A justifiable interference with a legitimate expectation of privacy should meet a standard beyond mere entertainment and vapid tittle-tattle. This could, for example, include contributing to the prevention of crime or the detection and exposure of serious impropriety, unethical conduct or non-compliance with a duty. The interference could similarly aim to protect the public from being misled by an organisation's actions or an individual's statements.

In more recent decisions, like *Von Hannover v Germany (No 2)* (2012) and *Axel Springer AG v Germany* (2012),[74] the Strasbourg court indicated that, depending on the circumstances of the case, the definition of what constitutes a debate of general interest may not be limited to political issues or crimes but may also extend to publications of private information concerning 'sporting issues or performing artists.'[75] In *Von Hannover (No 2)*, the Strasbourg Court held that the magazine *Frau im Spiegel* was entitled to publish a photograph of the Von Hannover couple (Princess Caroline and her husband Prince Ernst August) at a ski resort when it was published in connection to an article concerning the deteriorating health of the Princess' father, the reigning Prince of Monaco, and the way in which his children 'reconciled their obligations of family solidarity with the legitimate needs of their private life,'[76] including their desire to go on holiday. It seems therefore that the Strasbourg court allowed a bit more latitude for entertainment reporting without radically departing from the

[70] *A v B & C* [2002] EWCA Civ 337 [11].
[71] *Campbell v MGN Ltd* [2002] EWCA Civ 1373 [41].
[72] The Right Honourable Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Volume II* (The Stationery Office 2012) 602.
[73] *Von Hannover* (n 69) [76].
[74] *Von Hannover v Germany (No 2)* (2012) 55 EHRR 15 and *Axel Springer AG v Germany* (2012) (Joint Application No 3995/08).
[75] ibid [109] and [90] respectively. However, the rumoured marital difficulties of a country's President or a famous singer's financial struggles were not deemed matters of general interest.
[76] *Von Hannover (No 2)* (n 74) [117].

ACCEPTED

'debate of general interest' requirement for reporting on private issues.[77] It also emphasised that:

> Although in certain special circumstances the public's right to be informed can even extend to aspects of the private life of public figures, particularly where politicians are concerned, this will not be the case – despite the person concerned being well known to the public – where the published photos and accompanying commentaries relate exclusively to details of the person's private life and have the sole aim of satisfying public curiosity in that respect.[78]

The conduct of the person concerned prior to the publication of the report in question is also a relevant factor which can influence the balance between a celebrity's privacy right and freedom of expression. Individuals who courted public attention may have their right to privacy severely curtailed.[79] Hogan's previous revelations of details of his private life in the media could mean that he actively sought the limelight and therefore his legitimate expectation that his private life would be protected was reduced. However, the mere fact that an individual had previously cooperated with the press cannot serve as an argument for removing all protection against publication of the video in question.[80]

It can be strongly argued that in Mr Hogan's case it is unlikely that the public interest would be genuinely engaged. The publication of the video appealed to celebrity voyeurism and its purpose appeared to be titillation, rather than to contribute to a debate of general interest. In *Mosley*, it was held that although the public was interested in the video demonstrating the alleged depravity, as indicated by the 600% increase in the NOTW website since the release of the Max Mosley video, it did not automatically follow that the publication of the video was in the public interest.[81] This approach was more recently endorsed by the UK Supreme Court in the high-profile case of *PJS v NGN Ltd* (2016), which concerned the successful injunction of a well-known entertainment figure preventing the publication of the fact that he had a three-way sexual encounter with a couple:

> There is not, without more, any public interest in a legal sense in the disclosure or publication of purely private sexual encounters, even though they involve adultery or more than one person at the same time, (ii) any such disclosure or publication will on the face of it constitute the tort of invasion of privacy, (iii) repetition of such a disclosure or publication on further occasions is capable of constituting a further tort of invasion of privacy, even in relation to persons to whom disclosure or publication was previously made - especially if it occurs in a different medium.[82]

A majority of the Supreme Court expressed serious doubts as to whether the mere reporting of someone's sexual encounters, regardless of how prominent that person may be, with a view to criticising them fell within the concept of freedom of expression under Article 10 of the ECHR at all and respected the responsibilities that the Convention tells us come with that right.[83] It may therefore be concluded that the Article 8 side of the scales would outweigh the

[77] Balin and Takatsuki (n 10) 145.
[78] *Von Hannover (No 2)* (n 74) [110].
[79] *Axel Springer AG* (n 74) [101].
[80] *Von Hannover (No 2)* (n 74) [111] and *Axel Springer AG* (n 74) [92].
[81] *Mosley* (n 62) [114], [124], [128], [132].
[82] *PJS* (n 67) [32] (Lord Mance).
[83] ibid [24].

ACCEPTED

Article 10 side in Mr Hogan's case and the he would have probably succeeded in bringing a privacy claim under English law in relation to the video. However, as will be discussed in the following section, the damages would most likely be significantly lower than those awarded by the American court.

The award of damages

At the end of the two-week trial, Gawker Media had US$115 million dollars (£80m) in compensatory damages awarded against them for the alleged emotional distress and economic injuries Hogan suffered as a result of the publication of the excerpt of the videotaped consensual sexual encounter.[84] A 'final devastating blow'[85] of US$25 (£17.3m) million was awarded against the defendants in the form of punitive damages, of which US$10 million dollars (£6.9m) had to be paid by the founder of the website, Nick Denton. The amount of US$100,000 dollars (£69,500) in damages was also awarded against Daulerio, who made the decision to publish the excerpt and wrote the post that accompanied it.[86]

In civil cases, the purpose of punitive damages is not to compensate the claimant, but to punish the defendant for particularly reprehensible conduct and deter them (and others) from such conduct in the future. Kenneth Turkel, for the claimant, relied on the jurors' 'ability to send a message'[87] to unscrupulous news organisations that media's protection to report on public figures does not cover sex tapes. He asked them to exercise their power to reprimand the defendant by adding punitive damages both as a form of punishment to the gossip website, which acted with reckless disregard of the claimants' rights when it posted the video, and as a deterrent to other media companies which tend to act in a similar manner. Michael Sullivan, for Gawker, said that the award of US$115 million dollars was 'punishment enough.'[88] It was, according to him, 'already far beyond their means' and could be 'debilitating' for Gawker.[89] Gawker's founder, Nick Denton, commented that the decision of the Florida civil jury was 'extraordinary' and went, according to him, 'wildly off the rails.'[90] He announced that he would appeal against the outcome. In May 2016, a judge of the Sixth Judicial Circuit Court in Florida rejected Gawker's application for a new trial in the Hogan case and refused to reduce the jury's damages award of $140m.[91]

In England & Wales, the level of compensatory awards in privacy cases tends to be relatively low. Indeed, damages for misuse of private information have often been assessed at single

[84] Columbia Global Freedom of Expression (n 8).
[85] Paul Callan, 'Hulk Hogan Verdict Body-Slams Gawker' (*CNN*, 22 March 2016) <http://edition.cnn.com/2016/03/20/opinions/hulk-hogan-verdict-warning-shot-media-opinion-callan/index.html> accessed 19 September 2016.
[86] According to Hogan's legal team, Gawker Media's gross revenues in 2015 were US$48.7 million dollars (£33.8m) and the website's founder and owner had a total of US$121 million dollars (£84.2m). Gawker Media was worth US$83 million dollars (£57.7m). Daulerio had no assets and a 27,000 dollars (£18,000) student loan debt; 'Hulk Hogan Awarded Extra £17m in Sex Tape Lawsuit' (*Media Lawyer*, 22 March 2016) <http://medialawyer.press.net/article.jsp?id=11505071> accessed 22 March 2016; 'Gawker just got hit with another $25 million for punitive damages' (*Associated Press*, 21 March 2016) <http://uk.businessinsider.com/jury-awards-hulk-hogan-another-25-million-in-damages-in-gawker-trial-2016-3> accessed 20 October 2016.
[87] ibid.
[88] ibid.
[89] ibid.
[90] Nick Denton, 'The Hogan Verdict' (*Gawker*, 22 March 2016) <http://gawker.com/the-hogan-verdict-1766460791> accessed 22 March 2016.
[91] Tamara Lush, 'Judge denies motion for new Gawker-Hulk Hogan trial' (*Associated Press*, 25 May 2016) <http://bigstory.ap.org/article/56fd1eb1554f4f6bac31c9655751420e/hulk-hogan-gawker-back-court-florida> accessed 25 May 2016.

ACCEPTED

figure thousands.[92] In the leading case of *Campbell v MGN* (2002),[93] the Court of Appeal upheld a compensatory award for £2,500 for the super-model Naomi Campbell following the publication of photographs and details of her Narcotics Anonymous visits. An award of £1,000 as aggravated damages was also made for the appellants' conduct in 'trashing her as a person' in a highly offensive manner for taking her case to court. In *McKennitt & Ors v Ash & Purple Inc. Press Ltd* (2005),[94] where passages of the defendant's book, entitled 'Travels with Loreena McKennitt: My Life as a Friend,' were held to have presented a revealing and intrusive portrait of the Canadian folk singer Loreena McKennitt, Eady J ruled that the claimant was entitled to claim damages for hurt feelings and distress, and awarded the relatively modest amount of £5,000. English singer Paul Weller's children were awarded in 2014 a total of £10,000 in damages for misuse of private information.[95] The claim arose in relation to the publication of unpixelated photographs of the children's faces, illustrating an article which, according to the High Court, did not contribute to a relevant debate of public interest. The defendants unsuccessfully appealed against the High Court's finding of liability and were later refused permission to appeal to the Supreme Court. These sums represent rather modest levels of compensatory awards in comparison to awards in other fields of civil law, like defamation.[96] With these figures in mind, the award of damages in Hogan's case stand out as particularly heavy.

The largest award of compensatory damages in a privacy claim in England was given in *Mosley*.[97] The NOTW was required to pay Max Mosley damages of £60,000 (along with a proportion of the claimant's legal costs), representing the 'unprecedented' scale of distress, hurt feelings and indignity suffered by the claimant. The amount awarded was thought sufficient by the court to serve both a compensatory and a punitive function. It is, however, doubtful, whether exemplary or punitive damages are recoverable at common law in the context of a misuse of private information claim. Eady J concluded in *Mosley* that there was no authority in favour of extending the application of punitive damages into this newly developed field or including an additional element specifically directed towards deterrence.[98] Extending the scope of this relief would also fail to satisfy the tests of necessity and proportionality required to justify a free speech limitation.[99]

Awards of exemplary damages blur the distinction between criminal and civil litigation, where damages are typically compensatory in nature, i.e. they aim at righting a wrong by putting the parties to a position which is as close as possible to where they would have been, had the harm never occurred. The risk of an exemplary element to damages can discourage publishers, especially local or regional newspapers, from engaging in controversial subjects and can thwart investigative journalism. However, the levels of damages awarded thus far are

[92] Culture, Media & Sport Committee, *Press Standards: Privacy and Libel* (2009-10, HC 362-II) 54.
[93] *Campbell v MGN* [2002] EWCA Civ 1373 [139].
[94] *McKennitt* (n 66).
[95] *Weller v Associated Newspapers Ltd* [2014] EWHC 1163.
[96] Mark Warby, Nicole Moreham and Iain Christie (eds), *Tugendhat and Christie's Law of Privacy and the Media* (2nd edn, OUP 2011); Eric Barendt, 'English Privacy Law and the Leveson Report' in Normann Witzleb, David Lindsay, Moira Paterson and Sharon Rodrick (eds), *Emerging Challenges in Privacy Law* (CUP 2014) 188.
[97] *Mosley* (n 62) [216]; Joint Committee on Privacy and Injunctions, *Privacy & Injunctions* (2010-12, HL 273, HC 1443) 34.
[98] *Mosley* (n 62) [172] – [197], [235].
[99] In privacy cases, it remains open to claimants to seek an account of profits in lieu of compensatory damages. Although this would have the same financial effects as exemplary damages, such claims are difficult to pursue in practice, as they involve complex causation questions and calculations; Culture, Media & Sport Committee, *Press Standards* (n 92) 25.

arguably 'too low to act as a real deterrent.'[100] In common with the Joint Committee on Privacy and Injunctions, the Leveson Report recommended that damages generally available in privacy cases should be reviewed and that exemplary damages should be available in actions for misuse of private information and similar media torts.[101]

Moreover, in *Spelman v Express Newspapers* (2012),[102] where a rugby sportsman at the beginning of a promising career failed to secure an injunction against the disclosure of his use of banned performance-enhancing drugs, Tugendhat J suggested that damages awarded in earlier privacy cases were 'very low'[103] and it should no longer be assumed that awards at these levels limit courts' powers. He also referred to the generous sums paid to settle claims in the much publicised phone-hacking cases.[104] In future, however, as pointed out in *PJS v NGN Ltd* (2016),[105] a new statutory system of exemplary damages may apply against a publisher who is not a member of a regulator approved by the Press Recognition Panel (established in the wake of the Leveson Inquiry). Under ss 34-6 of the Crime & Courts Act 2013, a court is given wide discretion to award exemplary damages if it is of the opinion that the defendant's conduct has shown a deliberate or reckless disregard of an 'outrageous' nature for the claimant's rights, the conduct is such that the court should punish the defendant for it, and other remedies would not be adequate to punish that conduct.[106] The Panel has not yet approved any press regulator, which would allow ss 34-6 to take effect. It remains to be seen in the post-Leveson era what level of awards will be made, how often, and under what circumstances, these provisions will be used by the courts. Interestingly, in his dissenting opinion in *PJS*, Lord Toulson stated that he did not regard Eady J's decision in *Mosley* as the 'final word on the subject.'[107] Although he acknowledged the requirement of proportionality, he stated that he 'would not rule out the possibility of the courts considering [exemplary awards] to be necessary and proportionate in order to deter flagrant breaches of privacy and provide adequate protection for the person concerned.'[108]

Based on the study of Hogan's case, it may be suggested that, despite the relative similarities in approach between the two jurisdictions,[109] the quanta of financial remedies which acknowledge the intrusion and compensate the embarrassment and distress suffered by a claimant, differ considerably. It should not be neglected however that in Hogan's case it was the jury, rather than the judge, who determined the amount of the appropriate penalty. The

[100] Joint Committee on Privacy and Injunctions (n 97) 35.
[101] The Right Honourable Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Volume IV* (The Stationery Office 2012) 1512.
[102] [2012] EWHC 355.
[103] ibid [114].
[104] See for example *Gulati & Ors v MGN Ltd* [2015] EWHC 1482, in which the claimants' phones had been hacked by *Mirror* journalists over a period of years. Sadie Frost, an English actress, was awarded £260,250, reflecting the seriousness with which the High Court viewed the violation of her rights. The claimants' claims fell into three main categories in this case: wrongfully listening to private or confidential information left for or by the claimant, wrongfully obtaining private information via private investigators, and the publication of stories based on that information.
[105] *PJS* (n 67) [42].
[106] The provisions came into force on November 3rd, 2015. It is immaterial whether or not a regulator has been approved by the Press Recognition Panel. However, s 35(3)(a) of the Crime and Courts Act 2013 stipulates that the court must take into account 'whether membership of an approved regulator was available to the defendant at the material time.' This provision can thus provide a defence against the s 34 award if no such regulator had been approved at the material time.
[107] *PJS* (n 67) [92].
[108] ibid.
[109] Hughes and Richards (n 10) 166.

ACCEPTED

high award could be interpreted as a sign of how seriously the jurors regarded this sort of privacy violation.

In England, the decision on the question of whether exemplary damages are to be awarded under s 34 of the Crime & Courts Act 2013 Act or the amount of such damages 'must not be left to a jury.' This strongly worded statement in s 34(8) of the 2013 Act creates a mechanism of constraint against jurors' potential prejudice, bias or sympathy towards one party and a statutory guard against disproportionately large sums. Although, in practice, this prohibition on juries awarding exemplary damages only exceptionally applies to defamation cases,[110] it arguably demonstrates a complete lack of confidence in jurors' sense of fairness and ability to assess the appropriate level of award in a particular case.[111] In doing so, the Act deprives the courts and the general public from a helpful conceptual tool for measuring the level of public toleration for interferences with individual's rights by contemporary media and determining perhaps when the boundaries of toleration have been reached.

Concluding thoughts on the impact of the verdict in Hogan

The outcome in Hogan's trial shows that the disclosure of his sex video by Gawker was deemed a 'compelling privacy [injury] […] capable of withstanding the power of the First Amendment.'[112] A final aspect of this case to be explored briefly concerns its potential effect on reshaping the media's practice in relation to covering celebrities. It is not unlikely that the size of the award of damages will be reduced on appeal, as appellate courts tend to attach more weight to First Amendment protections than trial courts do. However, there is little doubt that the astounding sum resulted from jurors' strong condemnation of Gawker's conduct. As Callan put it, the level of the award in this case is:

> […] a warning shot fired across the bow of a rapacious tabloid press. Jurors and ordinary American citizens are fed up with out-of-control media that seem to believe that once the title of 'newsworthy' is arbitrarily attached to an event or a person, the First Amendment will protect the publication of even the most salacious and offensive material that can be dredged up by sifting through celebrity mud.[113]

The verdict could be seen as reflecting a shift in the public's tolerance for media interferences with individuals' privacy and implicitly communicates a message about the latitude afforded to publishers by readers and the members of the community more generally. What Gawker saw as 'an indiscretion that would have been quickly forgotten,'[114] was condemned by the jurors as a major intrusion into an individual's private life. This is also indicated by the fact that the damages awarded were US$40 million larger than what the claimant himself had originally asked for in relief. The outcome suggests that Gawker's editorial standards, and those of other media organisations focusing on celebrity scandals, are probably out of touch with how the public perceives privacy zones and what constitutes a substantive matter of public concern. Likewise, recent research in England has conclusively shown that large

[110] The Defamation Act 2013, s 11 removed the presumption in favour of jury trial in defamation cases. The result is that such actions are to be tried without a jury, unless the court orders otherwise.
[111] Cf *John v MGN Ltd* [1997] QB 586, 608, in which the claimant's award of damages was reduced from £75,000 to £25,000, the jurors were described by Lord Bingham MR as 'sheep loosed on an unfenced common with no shepherd.'
[112] Hughes and Richards (n 10) 165.
[113] Callan (n 85),
[114] Denton (n 90).

ACCEPTED

majorities of the public think that public figures' private lives should remain so and are clearly distinguished in their minds from matters that contribute to a debate of general interest and thus merit publication.[115] The verdict in Hogan may function as a powerful note of caution for online publishers and traditional news outlets reminding them that, when they consider publishing details of an intimate and sexual nature, they ought to refrain from abusing their power and act responsibly.

It is questionable whether the outcome itself has the potential to cripple press freedom in the US. The case has no precedential force, so justices could rule differently on a similar issue in a future case. It may be suggested that it simply demonstrates one court's view on what is considered newsworthy in 2016. The composition of the jury, and arguably their preconceived opinions of the former professional wrestler and/or the gossip website Gawker, may have also shaped the outcome to some extent. Jurors in different jurisdictions might have taken a different view on the newsworthiness of the tape, on who is considered a public figure and the extent to which news gatherers can intrude into celebrities' private lives. Nevertheless, the amount of $140 million proved to be 'the equivalent of a financial death penalty'[116] for Gawker Media. The organisation filed for bankruptcy and put itself up for sale in the summer of 2016.[117] It remains to be seen whether the staggering award in this case will operate in the US as a strong disincentive against taking the threat of privacy actions lightly in the future.

Finally, had Hogan's case been brought under the post-HRA 1998 misuse of private information tort in England, the outcome would not have necessarily been failure. Details of public figures' private lives have become 'a highly lucrative commodity for certain sectors of the media,'[118] especially because they help stimulate sales. Although the publication of such news, primarily aimed at entertaining their audience, enjoys the protection of Article 10 of the Convention, such protection may yield to the requirements of Article 8 where the information at stake is intensely of personal nature and no countervailing interest is served by its dissemination. However, Mr Hogan would have in all probability obtained far lower compensation in English courts. This factual scenario would have made for an interesting case had it been brought before a jury in England, especially following the NOTW phone-hacking scandal. In the aftermath of the Leveson inquiry, strong evidence has emerged that the balance of public opinion, which has consistently favoured protection of freedom of expression, has now shifted strongly in favour of individuals' privacy.[119] The influence of this shift on journalists' professional standards and the decision-making process determining everyday news content will become clearer in the years to come.

ACCEPTED

[115] Steven Barnett, 'Public interest: the public decides' (2012) 23(2) *British Journalism Review* 15.
[116] Callan (n 85).
[117] Sydney Ember, 'Gawker, Filing for Bankruptcy after Hulk Hogan Suit, is for Sale' *The New York Times* (New York, 10 June 2016) <http://www.nytimes.com/2016/06/11/business/media/gawker-bankruptcy-sale.html?_r=0> accessed 10 June 2016.
[118] Parliamentary Assembly of the Council of Europe, 'Resolution 1165: Right to Privacy' (Text adopted by the Assembly on 26 June 1998, 24th Sitting) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16641&lang%20=en> accessed 10 September 2016.
[119] Lawrence Knight, 'News of the World: Counting the Cost' *BBC News* (London, 7 July 2011) <http://www.bbc.co.uk/news/business-14044052> accessed 13 September 2016; Alison Park, Caroline Bryson, Elizabeth Clery, John Curtice and Miranda Phillips, *British Social Attitudes: the 30th Report* (NatCen Social Research 2013) xv.