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Robert Craig & Gavin Phillipson

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Privacy, reputation and anonymity until charge: ZXC goes to the Supreme Court

Robert Craig and Gavin Phillipson
School of Law, University of Bristol, Bristol, UK

ABSTRACT
This article seeks to defend the emergent consensus that suspects should be entitled to anonymity until charge and that the tort of misuse of private information ('MPI') is the appropriate action to protect this right. It systematically addresses Nicole Moreham's argument, in this journal, that breach of confidence, rather than MPI, should ground such claims, and that the case law to date risks awarding damages for harm to an undeserved reputation. The authors argue that multiple sources of law and theoretical accounts of privacy confirm this information is properly treated as private. In contrast, breach of confidence would provide an inadequate remedy. In response to the concerns on reputational harm, it argues that, in practical terms, the tort of defamation need not be undermined, as claimed. It further contends that the presumption of innocence can act as a guiding light in resolving the problems raised at the level of principle.

KEYWORDS Privacy; private life; suspect anonymity; breach of confidence; presumption of innocence; MPI

1. Introduction
In the aftermath of the Manchester Arena bombing, a young Muslim man was arrested on suspicion of being connected with the attack. The police did not name him, but a reporter discovered his name and a series of stories about his arrest appeared in the Mail Online and other papers, identifying him as being a suspected terrorist and publishing his photograph and numerous other personal details. He was subsequently released without charge, the police finding no evidence that he was involved in any way in the attack. Despite knowing that he had been thus cleared of any involvement, the Mail neither reported this, nor took down their story. On his release, the claimant discovered that his arrest had been reported all...
around the world; his name was online ‘everywhere, as a suspected terrorist’.¹ His parents in Libya had read about it and were extremely distressed; his mother required hospitalisation for PTSD and his father was dismissed from his work. He received multiple hostile messages on social media and repeated unwanted contact from the media, feared for his safety and felt forced to move to a different town. He was subsequently dismissed from his job, prescribed anti-depressants and felt unable to work for the rest of the year. Only after being contacted by his solicitor did the Mail, eventually, take the story down.

This is but one – albeit a remarkable – instance of the devastating effect that such stories can have on the lives of innocent people who are or have been under investigation for possible involvement in high profile crimes.² The purpose of this article is to ask what legal remedy such individuals should have. At first sight, the most obvious damage is to their reputation. However, claimants cannot bring an action in defamation where the press merely reports on the investigation and/or arrest and the basis for suspicion without adding any false accusations: the press in such a case would have the complete defence of truth.³ The answer to our question that the courts have been developing is that the recently-established tort of misuse of private information (‘MPI’) is the appropriate remedy for the grave damage done to individuals in these kinds of situations. The purpose of this article is to explain why they are right about that.

There is now a fairly well-established line of case law holding that suspects have a prima facie right to remain anonymous until charge;⁴ hence publicising their identity can give rise to liability under MPI, subject of course to the press’s Article 10 rights.⁵ In engineering this development, the courts have been working with both the grain of public opinion and in accordance with policies laid down by the College of Policing,⁶ as recommended by divers inquiries⁷ and senior government ministers.⁸ The closely-followed ZXC case has just been heard in the UK Supreme Court (‘UKSC’) and provides an opportunity for our highest court to confirm and consolidate these developments in line with this clear, emergent consensus. Both the High

¹The facts are of the recent decision in Sicri v Associated Newspapers Ltd [2020] EWHC 3541 (QB) [2021] 4 WLR 9; see esp. [47]–[51]. The suspect was also named by The Guardian. All weblinks that follow last accessed 15 December 2021.
²See text ff n 22 and text ff n 36 below.
³Subject to the standard evidential requirements to provide evidence of truth in such cases being satisfied – below at Section 5.3.
⁴See Richard v BBC; in the first ZXC hearing (17 April 2019) (n 9, below), confirmed by the Court of Appeal (n 10, below); Sicri (n 1 above).
⁵The basic elements of MPI appear below, text to nn 82 & 83.
⁶https://www.app.college.police.uk/app-content/engagement-and-communication/media-relations/?highlight=media%20relations
⁸Below, text to nn 25–26.
Court\(^9\) and Court of Appeal\(^{10}\) agreed that the defendant Bloomberg violated the claimant’s reasonable expectation of privacy by publishing details of a live and highly confidential investigation by an unspecified prosecuting authority (‘UKLEB’\(^{11}\)) into the company for which he worked. This article defends the outcome reached by these courts, seeks to provide further reasoning to support their findings and rebuts academic criticism of these and related judgments. It argues that the UKSC should confirm that there is now a presumption that defendants in general have the right not to be named until charge.\(^{12}\)

Nicole Moreham has recently argued in this journal that the disputed publications about the claimant in ZXC should not have been protected under MPI;\(^{13}\) we respond in detail to her arguments because she has set out the most sustained and wide-ranging critique of ZXC and the related case law that this article considers.\(^{14}\) She contends that if the information warranted protection at all, it was only (perhaps) because publishing it involved a classic breach of confidence: the relevant information was not related to ZXC’s private life, in the traditional sense of the word, because it was not concerned with the intimate inner zone of his life. Rather, she claims, the real mischief about which ZXC complained was damage to his reputation. Not only is this, for her, a distinct interest that overlaps only marginally with the right to privacy, but allowing MPI to be used to protect reputation in this way also risks compensating the claimant for an undeserved reputation, given they are reasonably suspected of involvement with criminality.

\(^{9}\)ZXC v Bloomberg LP [2017] EWHC 328 (QB) (initial hearing); ZXC v Bloomberg LP [2019] EWHC 970 (QB).

\(^{10}\)ZXC v Bloomberg LP [2020] EWCA Civ 611.

\(^{11}\)The particular body was not named in the case due to the sensitivity of the investigation.

\(^{12}\)Charge is widely seen as a defensible point at which a suspect’s identity may be revealed because of the marked change in the level of evidence-based suspicion of guilt. Mere investigation can be undertaken on any level of suspicion, rising to reasonable suspicion for specific intrusive acts, such as arrest, search of premises, etc. As Hugh Tomlinson has put it: ‘as was said in the leading case suspicion “is a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove’.” (Shaaban Bin Hussien v Chong Fook Kam [1970] AC 942, at 948). “Reasonable grounds” is a low hurdle. For example, it is common for several different people to be arrested where only one of them could have committed an offence – the others are innocent. Many suspects who are arrested are entirely innocent of any wrongdoing and are later released without charge. They have been, in the well-known phrase, “eliminated from inquiries.” https://inforrm.org/2013/04/10/leveson-secret-arrests-and-the-rights-of-suspects-a-question-of-balance-hugh-tomlinson-qc/. In contrast, charge means an independent prosecutor has determined that conviction is more likely than not; see https://www.cps.gov.uk/publication/code-crown-prosecutors esp. 4.6 and 4.7. Consideration of appropriate policy after charge is outside the scope of this article.


\(^{14}\)Paul Wragg is also highly critical of the decision in Richard, but mainly in relation to the public interest factors considered in stage two of an MPI case: T.D.C. Bennett and P. Wragg, ‘Was Richard v BBC correctly decided?’ (2018) 23(3) Communications Law 151, 159. We note where his criticisms anticipate those of Moreham at appropriate points below.
This article seeks to rebut each of these claims, arguing that developments over many years in MPI – a tort expressly conceived of as a vehicle for protecting Article 8 rights – render it wholly apt, normatively and doctrinally, to provide a remedy in cases like ZXC. While the case certainly raises issues of reputation, Strasbourg has repeatedly held, and the UK courts expressly accepted, that reputation is an aspect of Article 8 and several successful MPI claims have involved elements of reputation. This, we contend, is for good reason: revelation of facts that can cause major harm to a person’s relationships and interactions with others seriously affects their private life. While concerns about awarding damages for an unjustified reputation are understandable, cases like ZXC need to be recognised as a special category in which the revelation of true facts can cause serious damage to private life; hence they are appropriately addressed under MPI, provided care is taken not to thereby undermine the tort of defamation.

In response to Moreham’s claim that these cases are about confidentiality, not privacy, we note that there would be potential doctrinal difficulties in bringing such cases purely in breach of confidence but that, in any event, to postulate this kind of purist separation of ‘private’ and confidential information is misconceived. Finally, the article argues that suggesting those under investigation by the state should be judicially viewed as likely guilty of criminality or at least up to no good, could result in courts disregarding principles flowing from the presumption of innocence. The presumption, we argue, can function as a kind of guiding light to help resolve difficult normative dilemmas in this and similar cases.

The article proceeds in five main sections. Following this Introduction, the second part traces the recent emergent consensus amongst the police, courts, parliamentarians and the public that the privacy rights of those under investigation by the authorities should be protected. Part 3 sets out our arguments as to why there is a reasonable expectation of privacy in such circumstances; we explain why we think Moreham’s argument to the contrary is not only opposed to a strong legal consensus across multiple fields but is inconsistent with her own theoretical account of privacy and how it should be protected by law. Part 4 addresses the argument that cases such as this should be dealt with under the doctrine of breach of confidence, challenging it on the grounds indicated above. Part 5 explains why the

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16 In re Guardian News and Media Ltd [2010] 2 AC 697 esp. at [32]–[36].
17 In particular, as explained below, courts in MPI cases do not generally award damages specifically for vindication of reputation and did not do so in ZXC: below, section 5.3.
18 Text to and n 103 below.
19 See discussion below in section 5.2.
20 It is also a value explicitly recognised by Article 6 ECHR; see below, text to n 144.
use of MPI to protect the individual’s private life from the damaging effects of this kind of publicity does not conflate reputation and privacy, compensate for damage to an undeserved reputation or bypass safeguards for the media in the tort of defamation.

Our substantive analysis is confined to the proposition that suspects have, *prima facie*, a reasonable expectation of privacy in relation to the fact of being under criminal investigation by the authorities. We leave for another article consideration of the second stage of the MPI action in which this expectation would be balanced against the defendant’s freedom of expression. We do however indicate briefly in places why we consider that this development does not threaten legitimate media freedom, provided that it is subject to exceptions necessary to protect instances of genuine public interest.21

2. The developing consensus and case law

2.1. Developments beyond case law

Attitudes to press intrusion into the privacy of suspects in criminal proceedings have undergone a marked change in recent years. An important milestone came in Sir Brian Leveson’s powerful 2012 report, in response to multiple abuses of press freedom including the phone hacking scandal, in which he called for all suspects to be anonymous until charge. This was motivated partly by the appalling treatment by the press – described by Leveson as ‘a protracted campaign of vilification’22 – of the innocent landlord of Joanna Yeates, murdered in Bristol in 2010.

Leveson’s recommendation received significant reinforcement from Treacy LJ and Tugendhat J in the formal response submitted by the judiciary to the Law Commission.23 In an independent review of investigations by the Met into historic sexual abuse allegations, Sir Richard Henriques pointed out that it ‘is difficult, if not impossible, to articulate the emotional turmoil and distress’ caused to those falsely accused of serious offences whose reputations, ‘hard-won, over several decades’, can be ‘shattered by the word of a single uncorroborated complainant’.24

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21These might include instances where press coverage was seeking to expose (as the anonymous reviewer suggested) abuse of police powers; or (as Wragg suggests), ‘corruption’ – if the police appeared to be showing reluctance properly to investigate ‘powerful figures’ (n 14 above at 154); or reveal the arrest, say, of a senior politician. See also the discussion in n 147 below of particular instances where name release might encourage witnesses to come forward. None of these undermine the case for a *prima facie* expectation of privacy.

22Above, n 7, Part F, Chapter 1, at [3.25].


These recommendations have found widespread support. In 2013, the then Home Secretary, Theresa May, argued that ‘there should be a right to anonymity at arrest [subject to some exceptions]’ but not from the point of charge save ‘in extremely unusual circumstances’. The then Prime Minister, David Cameron, also recognised the force of the argument, while noting the balance that would have to be struck with the public interest in reporting where it was genuinely engaged. Senior leaders at the Bar have also voiced their support for maintaining the anonymity of suspects in certain circumstances. Finally, the College of Policing Guidance, updated in 2017, sets out a very clear policy:

Suspects should not be identified to the media (by disclosing names or other identifying information) prior to the point of charge except where justified by clear circumstances e.g. a threat to life, the prevention or detection of crime or a matter of public interest and confidence.

It went on to affirm that ‘Police will not name those arrested, or suspected of a crime, save in exceptional circumstances where there is a legitimate policing purpose to do so’ and noted this was in accordance with the recommendation and findings not just of Leveson but of the Information Commissioner and the House of Commons Home Affairs Select Committee.

Finally, it is important to note that the public are solidly behind this growing consensus. A YouGov poll undertaken after one of the key decisions – Cliff Richard v BBC – found that 86% of people thought suspects should be anonymous while being investigated; 83% said anonymity should also remain after arrest. A large majority in favour of anonymity until conviction was also found in polling data in 2013 concerning sexual offences. As will appear below, this provides direct support for finding a reasonable expectation of privacy in relation to criminal investigations, since such a finding depends in part on social mores.

We acknowledge of course that some of the above policies or suggested policies apply only to what the police should and should not do; they do not on their own show that the media should be restrained from naming

26 Ibid.
27 Maura McGowan QC then Chair of the Bar Council; interview, BBC Radio 5 Live 16 February 2013.
29 Ibid.
30 Richard v BBC [2018] EWHC 1837 (Ch), [333].
33 Below text to nn 74,76.
suspects. Moreover, while the police, as public authorities, are directly bound by the ECHR rights given domestic effect by the Human Rights Act 1998 (‘HRA’), the media are not – a point we consider below.\textsuperscript{34} The police policy is however highly significant in showing the view of the principal investigatory arm of the state that it is not generally in the public interest to name suspects. The policy also shows clear recognition of the damage that can be done to such individuals when their identities are publicised. This renders it very hard to argue that even a \textit{prima facie} right of suspect anonymity is somehow contrary to public policy. It is also clear that a formal duty to protect suspect anonymity lying \textit{only} on the police would often not prevent exactly the kind of mass publicity about on-going investigations that the police policy is designed to prevent: the media can still receive tip-offs from investigatory bodies (as in \textit{ZXC} and \textit{Richard}) or discover the fact of an arrest or investigation themselves (as in \textit{Sicri}). Hence the need to provide a remedy for such disclosures, directly against the media, via the tort of MPI.

2.2. Recent case law

\textit{Khuja} concerned a person referred to in open court by a witness in a serious sexual assault case, who was never charged with any offence.\textsuperscript{35} The judgment primarily turned on the ability to report statements like this made in open court; hence the decision is readily distinguishable from \textit{ZXC} since, according to the majority in the Supreme Court, such reporting fell under the open justice principle. Nevertheless, the judgments shed important light on the developing thinking of senior members of the judiciary on the issues of privacy, reputation and anonymity. In particular, they sow some doubt on the previous judicial assumption that the general public are well able to differentiate between suspicion and guilt, which justified a further assumption that reporting of the names of defendants or potential defendants would not cause them harm. While the majority and minority divided on the question of whether the naming of the claimant in open court disallowed his claim, they both acknowledged the potential harm to the claimant done by associating him with this kind of criminality.

As one of us argued in a note on the case, the effect on Mr Khuja of this decision was always likely to be severe.\textsuperscript{36} Indeed that author received a (wholly unsolicited) email from Mr Khuja shortly after that note was published, confirming the damage that the reporting had inflicted on his life:

\textsuperscript{34}See Wragg, n 14 above, esp at 153–54; below, text to n 150, 151.
\textsuperscript{35}\textit{Khuja (formerly PNM) v Times Newspapers Limited} [2017] UKSC 49, [2019] AC 161, [57].
\textsuperscript{36}R. Craig, ‘Open justice, free speech and privacy in the modern constitution: \textit{Khuja (formerly PNM) v Times Newspapers Limited}’ [2019] 82(1) MLR 129–145.
I have suffered immensely since the publication… comments at the school gates, business contacts refusing to deal with me, banks pulling a facility. Difficulty obtaining finance. People bringing up the police investigation to discredit me and everything else … . I am very lucky that I have such a supportive family, otherwise I wouldn’t have managed to get through it.\textsuperscript{37}

Mr Khuja’s experience reminds us once again that the presumption of innocence is a legal construct; judges and policy makers should not assume that those outside the criminal justice system apply it in the real-world judgements they make of those associated by press reports with serious crimes.

Awareness of this danger can also be observed in the judgment of Mann J in the Richard v BBC case, in which the BBC broadcast live footage of the search of Cliff Richard’s home in relation to allegations of historic child sex abuse; no charges were ever laid and nor was Richard even arrested. The judge found that the broadcasting of the search had caused immense distress and harm to a man who had spent his life building a spotless reputation.\textsuperscript{38} Mann J took the opportunity for the first time to draw together a coherent exposition of the law as it had developed in this area. He began by quoting Sharp LJ in the Court of Appeal in the Khuja case (then known as PNM), who noted:

\begin{quote}
a growing recognition that as a matter of public policy, the identity of those arrested or suspected of a crime should not be released to the public save in exceptional and clearly defined circumstances.\textsuperscript{39}
\end{quote}

Mann J, finding that this area of law ‘has not been clearly judicially determined’, went on to lay out the reasons why these dicta should be adopted;\textsuperscript{40} and made a formal ruling:

\begin{quote}
It seems to me that on the authorities, and as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation, and I so rule.\textsuperscript{41}
\end{quote}

The responsible Chief Constable subsequently admitted liability for breach of Richard’s privacy, apologised and paid damages of £400,000.

In the most recent case, Warby J (as he then was) could not have been clearer:

\begin{quote}
The notion that information about official suspicion engages an individual’s article 8 rights, because of its reputational impact, appears to me to have been firmly established at the highest level over a decade ago.\textsuperscript{42}
\end{quote}

\textsuperscript{37}The authors would like to thank Mr Khuja for his permission to quote his emails of 2 April 2019 and 10 October 2021 (on file with the authors). See also https://inforrm.org/2017/07/27/privacy-and-the-end-of-innocence-an-alternative-perspective-on-khuja-formerly-pnm-v-times-newspapers-robert-craig/.

\textsuperscript{38}Richard n 30, above.

\textsuperscript{39}PNM v Times Newspapers Ltd [2014] EMLR 30, [65].

\textsuperscript{40}Richard n 30, [234] and [322].

\textsuperscript{41}Ibid, [248].

\textsuperscript{42}Sicri n 1, above at [76]. Warby LJ now sits in the Court of Appeal.
His conclusion on the case (the facts of which were given in the Introduction above) was likewise emphatic in finding that the defendants had violated the claimant’s right to privacy with no sufficient public interest justification.  

It would seem, therefore, that, in addition to the broad societal consensus noted above, a clear legal principle has crystallised: under normal circumstances, publication of the identity of a person subject to investigation, search or arrest prior to charge should not occur.

### 2.3. The ongoing ZXC v Bloomberg litigation

This litigation relates to a criminal investigation into a private, international company which began in 2013 by a UK Law Enforcement Body (‘UKLEB’). ZXC worked for the company (though he was not a Director) and was suspected of fraudulent acts during the purchase of assets in a foreign country. In the course of the investigation, UKLEB sent a Letter of Request (‘LoR’) to an investigating authority in another country, summarising its evidence and preliminary conclusions, and requesting assistance in furthering the investigation. The LoR was leaked to the defendant, Bloomberg, which published extensive details of it on their website despite urgent calls by UKLEB for them not to do so. ZXC claimed that this publication breached his right to privacy under the tort of MPI. While unsuccessful at the interim hearing, he was successful at the full hearing and in the Court of Appeal.

Applying the first stage of MPI – whether there was a reasonable expectation of privacy in the information in question – Nicklin J confirmed that there is a reasonable expectation of privacy in the reporting of police investigations up to the point of charge, which applied to ZXC. While the claimant had not pursued a distinct claim in breach of confidence, the judge found that there was ‘a very clear public interest that the contents of the LoR should not be published and … the confidentiality of UKLEB’s investigations … maintained’. This, he found, could provide strong support for a finding of a reasonable expectation of privacy. He also found, at stage 2, that the balance of the public interest favoured maintaining the privacy of the investigation.

The Court of Appeal endorsed the reasoning and conclusions of Nicklin J, noted with approval dicta from Khuja, and found that “[t]he references [therein] to “irremediable damage” to reputation … give support for a general expectation of privacy in relation to those who have been arrested.”

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43Sicri at [190].
44ZXC (2019) n 11 above, [119].
46Ibid, [133].
47ZXC v Bloomberg [2020] EWCA Civ 611, [60], referring to Khuja, above, n 35 [49].
48ZXC (ibid), at [61].
Damage to reputation was found to be relevant to the sixth of ‘the Murray factors’ that determine whether the claimant has a reasonable expectation of privacy, namely ‘the effect of the publication on the claimant’. On this, it confirmed the finding at first instance that ‘the publication of the Information had a significant adverse impact on the Claimant both in terms of loss of autonomy and damage to reputation’.  

The Court dismissed the argument that the judge had erred in finding a reasonable expectation of privacy because ZXC’s role as a senior professional in a large public company was outside the sphere of his private life. Significantly, Simon LJ, in finding that the law now recognised a ‘reasonable expectation of privacy in respect of an investigation’, also made clear that it did not matter what type of crime was being investigated. Rather, a key consideration was the concern to protect the claimant from the failure of people in general to have proper regard to the presumption of innocence:

those who have simply come under suspicion by an organ of the state have, in general, a reasonable and objectively founded expectation of privacy in relation to that fact and an expressed basis for that suspicion. The law should recognise the human characteristic to assume the worst (that there is no smoke without fire); and to overlook the fundamental legal principle that those who are accused of an offence are deemed to be innocent until they are proven guilty.

An important ground of the appeal was the claim that the judge had in effect relied on the confidentiality of the LoR rather than basing his decision on privacy. Simon LJ rejected this, pointing out that the judge had instead focused on the public interest in maintaining the confidentiality of the LoR. Underhill LJ agreed with Simon LJ that the judge ‘did not fall into the error of conflating privacy and confidentiality’. Further aspects of the judgment are considered in making the argument that follows. We now turn to considering the three key objections that have been made to it.

3. Is there a reasonable expectation of privacy in being a suspect?

In answer to the above question, Moreham gives a straight ‘no’. ‘The fact’, she says,

49From Murray v Express Newspapers plc [2009] Ch 481 at [36].
50Above n 47, [75].
51Ibid, [62].
52Ibid, [81].
53Ibid, [84].
54Ibid, [82].
55Ibid, [148].
that the information is or should have been inaccessible as a matter of fact in
the situation in question is not enough to establish a reasonable expectation of
privacy in respect of it.

Rather:

A claimant seeking to establish a reasonable expectation of privacy … needs to
show that the information belongs to an intimate part of his or her life
into which others should not enquire.\textsuperscript{56}

She contends that the fact of being under investigation by the state, including
arrest, is simply not a private part of one’s life; hence it cannot in principle be
protected by privacy law.

This section aims to show the contrary. It will first consider arguments
of principle, deriving from general theoretical accounts of privacy, and
second go on to show how this is an area where three different
sources of law – English common law, the Strasbourg jurisprudence and
EU-derived, UK data protection law – have all reached the same con-
clusion: this kind of highly sensitive information should be protected by
law.

3.1. Arguments of principle

The argument that the disputed information in cases like ZXC does not fall
within the scope of ‘private life’ appears to be grounded in a narrow, almost
instinctive, conception of what privacy means.\textsuperscript{57} As Moreham puts it in her
critique of the cases this article considers:

According to both English case law and theoretical conceptions … privacy …
relates to matters concerning things like health, the intimacies of relationships
and domestic and family life, sexual expression, and the inner workings of the
mind.\textsuperscript{58}

She describes these areas, plus ‘the presentation of the naked body’ as those
that ‘have always been at the heart of the privacy interest’.\textsuperscript{59} Elsewhere she
adds to this very limited list of areas that count as part of private life: ‘the
experience of trauma, grief or strong emotion; the content of fears, fantasies,
dreams and detailed patterns of one’s daily life’ … \textsuperscript{60}

\textsuperscript{56}Moreham (2019) n 13 above, at 147.
\textsuperscript{57}The anonymous reviewer suggested that criminal investigations, including arrest, might be thought to
form part of the administration of justice; the relevant principle here would seem to be ‘open justice’,
commonly thought to require that the administration of justice via \textit{court proceedings} should normally
take place in public; this was a crucial point in \textit{Khuja} but does not apply to the line of cases, including
\textit{ZXC}, with which we are concerned, in which suspects have not yet even been charged.
\textsuperscript{58}N. A. Moreham (2019) n 13, above, at 152.
\textsuperscript{59}Ibid, 154.
\textsuperscript{60}Moreham ‘Unpacking the reasonable expectation of privacy test’ (2018) 134 LQR, 651, 659.
We make four arguments in response: first this approach is inconsistent with theoretical accounts of privacy, including, we contend, Moreham’s own; second, it relies on a particular argument – of there being fixed, objectively-private categories of information – that Moreham herself elsewhere expressly rejects; third, the checks that Moreham suggests should apply in law are satisfied in this case, particularly given the strong social consensus that such information should be treated as private; fourth, her approach disregards the effects of such revelations on the lives of actual claimants.

On the first point, then, Moreham’s postulation of such an artificially narrow scope for private life, confined solely to the intimate sphere, does not in fact accord with theoretical conceptions of privacy. W.A. Parent’s influential definition of private information – ‘facts about a person which most individuals in a given time do not want widely known about themselves’ and ‘facts which though not generally considered personal, a particular person feels acutely sensitive about’ – is strikingly inclusive, not narrowly confined to the specific, intimate areas here instanced by Moreham. Another leading commentator, Raymond Wacks, has defined personal, or private information as that which it is ‘reasonable’ for the subject to regard as ‘intimate or sensitive’ and therefore to wish to withhold or restrict access to it. The information at issue in a case like ZXC or Sicri is not intimate in any physical, sexual or familial sense but is manifestly of the highly sensitive kind that individuals very reasonably do not want to be subject to publicity.

Strikingly, the narrow approach Moreham takes in objecting to ZXC does not appear to be consistent with her own previous general account of privacy. As she wrote in 2018:

Privacy theorists have … often defined privacy in terms of an individual’s own control over, choice about or desire for access. Privacy is therefore seen as the “ability to control who has access to us and to information about us” or “freedom from unwanted access” rather than as a right to be protected against access to specified types of information or activity.

‘Freedom from unwanted access’ is indeed Moreham’s own, previously-advanced definition of privacy. As she wrote in 2005:

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64Moreham, n 60 above, citing Rachels, ‘Why Privacy is Important’ (1975) 4 Phil. & Publ. Aff. 323, 326.
65Moreham, n 63 above; her approach draws on Ruth Gavison ‘Privacy and the Limits of Law’ (1980) 89(3) Yale LJ 421.
Something is therefore “private” if a person has a desire for privacy in relation to it: a place, event or activity will be “private” if a person wishes to be free from outside access when attending or undertaking it and information will be “private” if the person to whom it relates does not want people to know about it.66

Plainly, the claimants in all the cases we have been discussing wanted precisely to be free from press access into, and resulting public knowledge about, an acutely sensitive issue in their lives. Hence, on Moreham’s own earlier account, claimants in such cases are indeed seeking to protect their private lives.

Second, Moreham’s attempt to suggest that there are particular categories of private information (sexuality, health etc) that exclude cases like ZXC’s is precisely the opposite of the approach to privacy for which she has previously argued. As she has put it, ‘Attempts to identify categories of inherently “private information” fare little better’ than abstract definitions; hence, ‘the only way to define the concept of privacy comprehensively is by reference, not to the type of information in question, but to the claimant’s wishes in respect of it’.67 This is because, as she argues:

no-one has successfully identified … categories of information which will always be private. Certain types of information which will usually be regarded as private might eventually emerge from the cases, but … it seems problematic to rely on a categorical approach to determine what is private in the first place.68

Her later attempt to use precisely such ‘categories’ or ‘types’ of information to argue that the information in ZXC is ‘not private’ thus seems to contradict the very approach she has previously advocated.

The third argument requires a little more unpacking. Moreham might respond to the above by pointing to her own perfectly reasonable argument that her theoretical model of privacy – centred on the claimant’s own wishes about the information she wants to keep to herself – must be subject to some limits when translated into law, in order to avoid a right to privacy that would be ‘intolerably broad’.69 Her proposed checks in this regard are threefold;70 first, there must a public interest/freedom of expression defence; second, the defendant should only be liable where they knew or ought to have known that the claimant wished the information to remain private; and third an objective element must be introduced so that a claimant’s desire for privacy is protected only where their expectation of privacy is ‘reasonable’ in the circumstances.71 These

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66Ibid, at 636.
67Ibid, at 642–43 (emphasis added).
68Ibid, at 646.
69Ibid, 644.
70Ibid at 643–46.
71Ibid, 645.
second and third tests serve as a legitimate means of ensuring that potential defendants are not subject to idiosyncratic and hence unforeseeable expectations of privacy in relation to information that most would not consider sensitive.\footnote{See Moreham, n 63 above, at 645 approving this objective element of the reasonable expectation test as expounded in Campbell.}

Let us take these in turn to see if any of them would rule out claims like ZXC’s. First, it is elementary that there is a freedom of expression defence that involves consideration of the public interest – this is stage two of any MPI case.\footnote{See below, text to n 83.} Second, defendants in such cases clearly have constructive, if not actual, notice that the claimant wishes the information to remain private. This limb is thus also met. This is because, third, no-one could possibly suggest that such a desire is eccentric or unusual; to the contrary it is objectively reasonable and factually widespread. Recall that if there is doubt over whether the claimant’s expectation of privacy in the information is reasonable, the question to be asked is ‘what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity’.\footnote{Murray v n 49, above, at [35].} There is overwhelming evidence that an ordinary person would want the fact of such an investigation to remain private; we noted above polling that has consistently shown large majorities of British people believe that the press should not identify those being investigated by the police.\footnote{Above text to and nn 31,32.} Moreham herself has argued that: ‘an action for breach of privacy … should reflect social mores about what should and should not be regarded as private’.\footnote{Moreham, n 60 above, at 659.} In this case the social mores amount to a settled public view that such investigations should be kept private at least until charge.

Thus, application of Moreham’s three limiting legal criteria leave untouched the original conclusion: there is \textit{prima facie} a reasonable expectation of privacy in the fact of being under investigation. Moreham’s general account of privacy nowhere suggests that the law should impose a fourth condition, that the information \textit{must also} fall into some recognised category of intimate information like sex-life or health.\footnote{Moreham conceded in her 2018 article (ibid) that categories can be ‘useful’ as guidance to what is generally considered private and/or has been found so in previous cases (ibid at 660); but she did not there or in her earlier work suggest that falling into such a recognised category should function as a requirement in a privacy case.}

Our fourth and final point is that Moreham’s approach appears to disregard the actual effects on the claimants in particular cases. For example, she argues that the intrusion in \textit{Cliff Richard} (and similar cases) was not serious and certainly nothing like that which occurred in \textit{Mosley} in which intimate

details of the sexual life of the claimant, a high-profile businessman,\(^{79}\) were splashed all over the press. Her approach, however, is again based on the nature of information revealed in each case and neglects the impact on a person’s *psychological* integrity and peace of mind.\(^{80}\) This can be as seriously affected by damage to their social standing amongst their friends, family and the public as by revelations of embarrassingly sexual proclivities. Revealing to the world that an individual is under investigation by the state can have devastating impacts on their mental health and well-being via the effects on their personal and professional lives and social standing – as the evidence of the effects of such reporting in *Sicri* and *Khuja* clearly demonstrates. Consideration of the ‘effects on the claimant’ is indeed one of the well-established ‘Murray factors’ used to help determine whether there is a reasonable expectation of privacy.\(^{81}\)

### 3.2. The strong legal consensus

As readers will recall, determining the reasonable expectation, the first stage in an MPI case, involves asking first whether ‘the information [in question is] private in the sense that it is in principle protected by article 8?’\(^{82}\) If so, all the relevant circumstances (non-exhaustively enumerated as ‘the Murray factors’) will be examined to see whether they serve to strengthen or negate that in-principle protection. If the claimant succeeds at the first stage, the court then considers whether at the second stage their *prima facie* reasonable expectation of privacy must give way to the defendant’s interest in freedom of expression,\(^{83}\) something that generally turns on an assessment of the degree of public interest in the disputed publication.

The courts’ view that information about state investigations into an individual’s possible criminal conduct is within the scope of their Article 8 rights has been clearly established for some time now. Indeed, as Warby J (quoted above) recently noted, it was ‘firmly established at the highest level over a decade ago’.\(^{84}\) The case he cites was a decision of the former House of Lords from 12 years ago – *re British Broadcasting Corp.*\(^{85}\) It is notable not just for the clear acceptance that Article 8 is engaged in such situations but for the clarity of the reasoning behind it. The issue was whether the House:

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\(^{79}\)Moreham ibid.

\(^{80}\)Moreham above n 60, at 660. She did however argue in 2018 that, as an aspect of the public interest defence, claimant ‘cannot use the privacy action to hide his or her wrongdoing’ (ibid, at 644) and this later became her other key objection to *ZXC*. This is considered below: Section 5.2.

\(^{81}\)The sixth, as noted above: nn 49, 50.


\(^{83}\)For a useful summary of the law, see *Sicri* n 1, at [61] (quoting the Court of Appeal in *ZXC*, n 10, at [40–48] and [103–109].

\(^{84}\)Sicri n 1, above at [76].

had any basis for making an order conferring anonymity on an individual (D) who had been tried and convicted of rape but acquitted by the House on appeal. The BBC wished to broadcast a programme suggesting that retained DNA gave grounds for considering whether … he should be re-tried. The House held that it had the jurisdiction in question, and was entitled in principle to exercise it to, protect D’s article 8 rights.86

The DNA information was itself identified as ‘as an aspect of D’s private life’ – a factor specific to that case – but Lord Hope’s reasoning on the privacy interest sweeps well beyond that particular factor: his concern was that the publicity

… will inevitably suggest that he is guilty of the offence. … His reputation, his personality, the umbrella that protects his personal space from intrusion, will just as inevitably be damaged by it. The conclusion that broadcasting this information will engage his right to respect for his private life seems to me to be inescapable.87

This then was clear recognition, at the highest level, of the hugely damaging impact on private life that publicity about suspected criminality can have. This was also something that, as Warby J points out, the Supreme Court unanimously recognised in re Guardian News Ltd, even though finding that, in the particular circumstances of that case, the public interest in the reporting justified the admitted ‘curtailment of [the claimants and their families’] right to respect for their private and family life.’88 Thus the claimants lost this case at stage two; but only after, at stage one, the Supreme Court had unanimously found their Article 8 rights to be engaged.

Even leaving aside the more recent case law examined in section 2 above, then, Moreham’s contention that such information falls in the first place outside the legal scope of private life would cut squarely across the reasoning in several judgments at the highest level in English law.

Her view is also plainly incompatible with the broad scope of Article 8 delineated by the Strasbourg court. As the Court has observed:

Article 8 also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. It may include activities of a professional or business nature. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of “private life”.89

86Sicri n 1, above, at [76(1)].
87Above, n 85.
88Guardian n 16 above, at [52].
This was acknowledged by Lord Sumption in a recent Supreme Court decision, when he said that:

the concept of private life in the jurisprudence of the Convention… must extend to every occasion on which a person has a reasonable expectation that there will be no interference with the broader right of personal autonomy recognised in the case law of the Strasbourg court.90

Specifically Strasbourg has found that ‘[p]rofessional life…part of the zone of interaction between a person and others which, even in a public context, may fall within the scope of “private life”’.91 An important illustration of this zone is Strasbourg’s finding that a search at the business premises of a lawyer engages Article 8 because the investigators may breach legal professional privilege, which is the basis of the relationship of trust existing between a lawyer and his client.92 Thus lawyer-client correspondence – a paradigmatic example of a professional, not a personal relationship – falls within the scope of private life under Article 8 and this would evidently be so whatever the lawyer was advising on, including alleged criminality in relation to business activities. Such professional correspondence relating to alleged criminal conduct in relation to a business matter was precisely what was at issue in ZXC. Indeed, Strasbourg has expressly found that being the subject of a criminal investigation, even when connected to professional interests, is a matter that in principle falls within Article 8.93

Lastly, and in relation to EU-derived law, it should be noted that, as Warby J held in Sicri:

for 25 years data protection law has classified personal data relating to “the … alleged commission by [the data subject] of any offence” as “sensitive personal data” or, “special category” personal data, the processing of which requires additional justification.94

It is desirable for Article 8, English common law, and the conception of ‘personal data’ used in the UK’s data protection regime based on EU law95 to retain at least a basic overall harmony; Moreham’s approach risks splintering it into incoherence.

90R (Catt) v Association of Chief Police Officers [2015] AC 1065, at [4].
91Mółka v. Poland (dec.), no. 56550/00, ECHR 2006-IV (emphasis added).
93Sciacca v Italy (Application No. 50774/99) (2006) 43 EHRR 20; Zeitschriften-Verlags-GmbH v Austria (App. No. 62746/00).
94Sicri n 1 above at [85].
95The GDPR, (now renamed the ‘UK GDPR’) is part of retained EU law under s 3 of the European Union (Withdrawal) Act 2018; the UK enacted legislation, pre-Brexit, about aspects of the GDPR left to Member States: Data Protection Act 2018.
4. Are such cases really (only) about breach of confidence?

4.1. Why breach of confidence is not a satisfactory remedy

It is well known that the advent of the HRA accelerated the courts’ development of a right to privacy from the pre-existing equitable doctrine of breach of confidence,\textsuperscript{96} fused with a form of indirect horizontal application of Article 8 ECHR.\textsuperscript{97} Over time, these developments reached the point at which the courts were prepared to formally christen the new tort of MPI.\textsuperscript{98} Moreham’s second major argument on ZXC is that any reporting of the fact that a named individual is the subject of criminal investigation, suspicion or arrest should not be dealt with under MPI, but instead as a possible breach of confidence,\textsuperscript{99} and then only in some limited circumstances. Essentially, these would be, ‘where the source of the disclosure was a person who obtained the information in the exercise of a legal power or in furtherance of a public duty’,\textsuperscript{100} in practical terms this would apply:

if the police allow information about or obtained in the course of an investigation to fall into the hands of the media then \textit{[prima facie]} … both the police and any third party that publishes the information can be liable to the subject in breach of confidence.\textsuperscript{101}

Moreham refers to this as the ‘Marcel principle’ and cites Lord Toulson’s formulation of when a duty of confidence will arise:

where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom it was received or to whom it relates not to use it for other purposes.\textsuperscript{102}

For a number of reasons, we do not find this suggestion persuasive. First, the alternative of a possible action in confidentiality would only be needed if MPI was not available, an argument we have already rejected. Second, since a

\textsuperscript{96}The literature is extensive; see e.g., G. Phillipson, ‘Transforming Breach of Confidence? Towards a common law right to privacy under the Human Rights Act’ (2003) 66(5) MLR 726–758; ‘The Right of Privacy in England and Strasbourg compared’ in A. Kenyon and M. Richardson (eds), \textit{New Directions in Privacy Law: International and Comparative Perspectives} (Cambridge: CUP, 2006); Moreham, nn 60 and 63 above.
\textsuperscript{98}\textit{Campbell v MGN} [2004] 2 AC 457.
\textsuperscript{99}The House of Lords in \textit{A-G v. Guardian Newspapers (No. 2)} [1990] 1 AC 109 used the useful summary of the doctrine in \textit{Coco v. A. N. Clark} [1969] R.P.C. 41: ‘First the information itself … must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information …’
\textsuperscript{100}Moreham (2020) n 13 above, 2.
\textsuperscript{101}Ibid, at 11.
\textsuperscript{102}\textit{R v (on the application of Ingenious Media Holdings) v Commissioners for Her Majesty’s Revenue and Customs} [2016] UKSC 54, [17].
significant aspect of the justification for protecting this kind of information derives from the right to reputation, now firmly established as being an aspect of private life under Article 8, it seems more fitting to base cases concerning a suspect’s anonymity on privacy, not breach of confidence. Third, the ‘Marcel principle’, outlined by Moreham above, might be able to give a remedy to a claimant where the police deliberately leaked details of an investigation to the press but presumably not in the situation where, as in Sicri, the press obtained the details by some other way. Hence it would not satisfactorily cover the field. And fourth, there appear to be serious doubts as to whether breach of confidence – in its orthodox, rather than privacy-protecting extended form – can be used even where there is such a leak: recent authority has held that in such instances any duty of confidence may be owed to the police or other investigatory agency from which the information was wrongfully disclosed, but not to the suspect themselves.\textsuperscript{103}

4.2. Are the courts in danger of conflating confidentiality and privacy?

For all these reasons, then, the idea of using confidence instead of privacy in such cases seems fraught with difficulty. There is, however, one issue here that requires closer consideration: whether bringing issues of confidentiality – which are undoubtedly strongly present, especially in ZXC’s case – into consideration of the reasonable expectation of privacy amounts to a kind of conceptual confusion, a failure to keep the values of privacy and confidentiality distinct. Moreham indeed argues that Nicklin J’s apparent decision to treat the confidentiality issues raised in the case as probative of a privacy claim conflated two quite separate issues. For her, the confidentiality of information cannot be determinative of a privacy case unless it relates to an ‘intimate part of his or her life into which others should not enquire’,\textsuperscript{104} something that, as seen, she denies is the case in ZXC.

The highly confidential nature of the ‘Letter of Request’ (‘LoR’) and the details it contained was certainly an important factor for the courts in ZXC. At first instance it was noted that ‘the LoR had been given to the journalist in what must have been (and should have been recognised as) a serious breach of confidence’.\textsuperscript{105} It was serious because, as the UKLEB warned Bloomberg pre-publication, publishing details of a highly sensitive, ongoing investigation posed ‘a material risk of prejudice’ to it.\textsuperscript{106} Indeed, the UKLEB expressed its ‘consternation’ at the publication and the

\textsuperscript{104} Moreham (2019) n 13, 147.
\textsuperscript{105} ZXC (2019) above n 9 at [125], sub-paragraph [125(ii)(g)].
\textsuperscript{106} Ibid at [34].
'disregard’ Bloomberg showed for its possible adverse consequences.107 At first instance, Nicklin J found that ‘the high-level of confidentiality that … attaches to the Information is a very significant factor when considering whether [the Respondent] has a reasonable expectation of privacy in that Information’ as was the ‘serious breach of confidence’ entailed by the passing of the LoR to Bloomberg. As the Court of Appeal confirmed, this was entirely orthodox: of the ‘Murray factors’, that help determine whether there is a reasonable expectation of privacy, the seventh requires consideration of ‘the circumstances in which and the purposes for which the information came into the hands of the publisher’.108

The courts further found that the weighty public interest in maintaining the confidentiality of the investigation in ZXC could properly be considered during the stage two balancing exercise. While this exercise also of course included careful consideration of the freedom of expression interests of Bloomberg, the degree of public interest (or otherwise) in publishing the details of the investigation could simply not be sensibly assessed without considering this factor. There is a rich academic literature on the broader social purposes or values that privacy can serve:109 ZXC – in which the interests protected by the claimant’s case went beyond his own individual privacy rights – is a nice illustration of that thesis.

Could it, however be argued that, in approving a strong role for breach of confidence in a privacy case, we are failing to keep the two principles distinct? This is an important issue: one of us strongly criticised the courts, pre-Campbell, for equivocation between the values of confidence and privacy – purporting to protect privacy, but still being held back by principles deriving from breach of confidence.110 Is this what the court would be doing here? Not at all. The problem highlighted in these pre-Campbell cases was courts failing to give a remedy where privacy had clearly been breached because they did not consider there had also been a clear breach of confidentiality. An example was A v B plc, in which the court largely disregarded the fact that sexual life is generally seen as a core area of private life. It focused instead on what it said was the ‘significant difference’ between the confidentiality of stable [sexual] relationships and transitory ones;111 and this was just a transitory affair. Thus the court asked whether the relationship was a confidential one, instead of whether the information in question was clearly of a private nature.

107Ibid at [64].
110Phillipson, n 96 above.
The whole project of developing an action in privacy from breach of confidence, on which one of us has written for over 25 years, has been to enable ‘breach of confidence’ to transform sufficiently so that privacy could be protected even where neither a confidential relationship or any of the traditional markers of confidentiality were present. But the fact that confidentiality is no longer a necessary factor for privacy to be protected emphatically does not mean that it should be treated as somehow irrelevant, still less an obstacle. There will be numerous situations in which privacy and confidentiality go hand in hand: when an employee at Narcotics Anonymous leaked details of Naomi Campbell’s therapeutic treatment for drug addiction, the House of Lords had no difficulty in finding the information obviously private because it related to her health; but there was also an obvious, gross breach of confidence by the employee concerned, given the whole basis of treatment at NA is anonymity and hence privacy. As Lady Hale put it in Campbell:

It has always been accepted that information about a person’s health and treatment for ill-health is both private and confidential. This stems not only from the confidentiality of the doctor–patient relationship but from the nature of the information itself.

Similarly, the Prince Charles Diaries case, post-Campbell, was treated as a privacy case, but, as the court noted, in getting the leaked ‘diaries’ by Prince Charles (in reality letters) ‘the Daily Mail had clearly received the fruit of a broken confidence, most probably by a former member of the Prince’s staff’. Moreover, this case was not one, like Campbell, that involved confidentiality over information generally considered obviously private by virtue of its subject matter. Indeed, as the Daily Mail unsuccessfully argued:

The material in the Hong Kong journal [related] to the public life of a public figure [concerning political events] setting out views and impressions … “of a political character” … formed by the claimant in the course of official duties carried out on behalf of the nation and at public expense.

Nevertheless, the fact that it had only come into the hands of the Mail as a result of a clear breach of confidence, together with the fact that the letters themselves were marked ‘private and confidential’ and hence prima facie covered by Article 8 ECHR, resulted in the court finding their contents protected by the new action of misuse of private information. Indeed, the Court

113Ibid, at [147]. As Lady Hale expressly noted: the information (which she described as both private and confidential) had also been received from an insider in breach of confidence.
114Ibid, [145] and [147].
115HRH Prince of Wales v Associated Newspapers Ltd [2008] Ch. 57, [2006] EWCA Civ 1776 at [83–4].
116Ibid, at [104].
of Appeal judgment expressly noted that ‘the nature of the information’, ‘the form in which it is conveyed’ and ‘the fact that the person disclosing it was in a confidential relationship with the person to whom it relates’ all formed an ‘interdependent amalgam’.118

In short, there are cases in which it is implausible to suggest information is ‘confidential’ – photos taken of someone in a public place,119 information about a transitory sexual encounter – but which are clearly of a private nature because of the nature of the information in question and all the surrounding circumstances. As one of us has previously argued, once the focus of the action becomes the protection of Article 8 rights, protection for private life should not be withheld because traditional confidentiality factors are absent.120 But that emphatically does not mean that breaches of confidentiality can no longer play an important role in bolstering the claimant’s case in privacy cases; on the contrary, the two sometimes go naturally hand in hand.

5. Is it legitimate to protect reputational interests via MPI? Three objections answered

A party is entitled to invoke the right of privacy to protect his reputation. (Lord Sumption in Khuja).121

Moreham has three, interlinked objections to what she sees as the use of MPI in this and similar cases to protect what she sees as essentially reputational interests: first, privacy and reputation interests are conceptually and legally distinct; second using MPI in this way risks protecting an undeserved reputation; third a successful claim in MPI would bypass protections for the media built into the tort of defamation. Paul Wragg has, more briefly, expressed similar concerns.122 This section addresses each of these objections in turn.

5.1. Objection one: privacy and reputation interests are separate and overlap only incidentally

The sub-heading here summarises Moreham’s argument, which rests on the idea that the protection of reputation is concerned with the damage caused by false allegations. In contrast, she says, privacy firstly only protects against such allegations should they concern an intimate area of life123 and secondly,
can do so only incidentally because privacy law is concerned with truthful revelations. The first point is simply an aspect of her argument that MPI cases should be confined to various categories of intimate life, considered in part 3 above. On the second point, as she puts it:

unlike defamation, the privacy action is primarily concerned with the revelation of information which is true. It protects people against disclosure of their actual health records, of their real thoughts, against the exposure of their actual body. In other words, it protects against the unwanted exposure of intimate aspects of the true self.\(^\text{124}\)

Her objection here, however, mistakes the nature of the claim made in cases like ZXC: they are objects to the publication of true facts – the details of their arrest, the investigation into them; their objection is precisely to the unwanted exposure of this true, but highly sensitive information relating to their lives.

As Rowbottom has argued in this journal:

Defamation can be understood as a right not to have untrue allegations made about you. The basic wrong is where the untrue statement forms the basis on which the public evaluates the person.\(^\text{125}\)

Thus, whereas in defamation cases the crux of the claim is that false allegations have damaged the claimant’s reputation, in cases like ZXC the claim is that true but highly sensitive facts have caused such damage that in turn has caused a serious interference in private life. As we have seen above, especially in Khula and Sicri, revelations that individuals are under suspicion and investigation by the state can have enormously damaging impacts on their everyday lives, including their relationships with others, their mental health and their well-being. Moreover, as Rowbottom has pointed out, ‘it is harder to undo the damage caused by publicity where the underlying information is true.’\(^\text{126}\)

The link between damage to reputation and disruption to one’s private life is therefore clear at the practical level; Bennett provides a compelling explanation of why reputation and privacy are closely linked at the conceptual level, if ‘privacy is conceptualised as an interest in one’s dignity and autonomy’:

One’s reputation, after all, contributes to one’s dignity; to traduce one’s reputation (undeservedly) is to act with contempt for one’s dignity. A good reputation, moreover, contributes to our ability to lead autonomous lives; a bad reputation is likely to see avenues for self-advancement and self-development that we might choose to take (perhaps in our choice of employment) curtailed.

\(^{124}\)Above, n 13 (2019) at 152.  
\(^{125}\)Rowbottom ‘Reporting police investigations, privacy rights and social stigma: Richard v BBC’ (2018) JML 115, 123.  
\(^{126}\)Ibid.
Thus, we might say that a diminution in one’s reputation is a diminution in one’s right to private life.\(^{127}\)

Notably in this regard, Moreham has elsewhere expressed strong approval\(^{128}\) of Lord Hoffmann’s dicta in the leading *Campbell* case in which he said that the law in this area now focuses on

the protection of human autonomy and dignity – the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people.\(^{129}\)

Quite so. MPI is therefore conceptually the right home for such claims; the tort of defamation is not, because it relates to the damage caused by *false* claims.\(^{130}\) This answers Wragg’s similar concerns that cases like *Richard* involve an ‘unhappy conflation of privacy harms … with reputational concerns’.\(^{131}\)

Moreham’s argument also runs counter to the growing recognition, both domestically and at Strasbourg, that the protection of reputation falls within Article 8 because it can be an important aspect of the autonomy and personality rights of the individual.\(^{132}\) Strasbourg has summarised the position in a recent decision, which cites numerous other recent authorities, explaining that Article 8 applies where:

an attack on a person’s reputation … attain[s] a certain level of seriousness and [is] made in a manner causing prejudice to personal enjoyment of the right to respect for private life\(^{133}\)

This broadly aligns with the conceptual position explained above.

We have, however, been talking of the harm done to those who are ‘merely’ under investigation. But does this wrongly assume their innocence? Suppose claimants later turn out to be guilty and are convicted? Is there not a danger that, by using MPI, they could in effect be awarded remedies for what

\(^{127}\)Above, n 14, at 159.

\(^{128}\)Moreham, ‘Privacy in the Common Law’, n 63, at 635.

\(^{129}\)Campbell, above n 98 at [51].

\(^{130}\)This is partly demonstrated via one of the cases (*McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73) Moreham cites as showing, contrary to the *dicta* of Lord Sumption above (n 121) that ‘where the nub of a claim in privacy or confidence is the protection of reputation’ the claim should be in defamation’ (n 13 above (2019) at 150). However at para 79, which Moreham cites, Buxton LJ lays down a much narrower condition: abuse of process could be claimed in relation to a confidence/privacy case ‘where the nub of the case was a complaint of the falsity of the allegations, and that that was done in order to avoid the rules of … defamation’. As discussed, that is not the nub of the case in instances like *Sicri* and *ZXC*.

\(^{131}\)Above, n 14, at 154. Wragg suggests that any claim for reputational harm should only be made ‘after the police investigation is concluded’ (ibid). However, given that defamation claims are subject to a strict limitation period of one year, if press reports are made at an early stage of an investigation, any claim that had to await the conclusion of the investigation might well be out of time (as it would, for example in *ZXC* itself).

\(^{132}\)Text to and n 16 above.

\(^{133}\)Case of *Jishkariani v Georgia* (Application no. 18925/09) (20 September 2018) citing *Delfi AS v. Estonia* [GC], and *Medžlis Islamske zajednice Brčko and Others v. Bosnia and Herzegovina* (references omitted).
is simply the revelation of their own wrongdoing? This takes us to our second issue.

5.2. Objection two: the current approach risks giving a remedy in respect of reports of likely wrongdoing

As we saw above, Moreham has previously argued, quite rightly, that any theoretical definition of privacy must be subject to some checking and limiting factors when transplanted into law.\(^{134}\) One of these is that claimant privacy rights must be balanced against the freedom of expression of the defendant and in particular any public interest in the information in question; Moreham previously suggested that there is a particularly strong public interest in making sure that a claimant ‘cannot use the privacy action to hide his or her wrongdoing’.\(^{135}\) This is one of her key objections to the judgments to date for the claimant: that he (and other similar claimants) want protection for the information in question not because it is private, but because publicising it will reveal that which they are anxious to conceal – their own wrongdoing. Not only would allowing this be a misuse of the law; it gives rise to a strong risk of awarding damages on a false basis, thus fundamentally subverting the law of defamation under which evidence of the truth of an allegation is a complete defence.\(^{136}\) The specific issue of awarding damages for harm to an undeserved reputation is considered below in Part 5.3. Here we consider the key objection of principle.

Moreham argues that:

[The] police would not have been executing a search warrant or sending a letter of request to a foreign state unless there was at least some credible evidence that the suspect had been guilty of wrongdoing serious enough to warrant state sanction. Indeed, it is reasonable for courts to assume that whenever police are investigating a suspect there will be some reason to think that he or she might be guilty of an offence. In the vast majority of cases (if not all) suppressing the fact that a person is being investigated by the police therefore prevents the public from finding out about possible wrongdoing.\(^{137}\)

In seeking to defend the idea that naming is justified because the defendant must have done something to justify investigation, she goes even further:

saying that something is private is tantamount to saying that the information relates to an aspect of the claimant’s life which is no-one else’s concern. That will be difficult to maintain if the claimant is harming others or is otherwise up to no good.\(^{138}\)

\(^{134}\) Above at text ff n 69.
\(^{135}\) Above, n 63 (2005), at 644.
\(^{136}\) Now codified in section 2 of the Defamation Act 2013.
\(^{137}\) Moreham (2019), above n 13, at 155.
\(^{138}\) Ibid, 159.
Indeed, she actually criticises the judgment in *Richard*, in which, as she puts it ‘the claimant’s innocence was assumed without further explanation’. This despite the fact that, by the time Mann J heard Richard’s privacy case, the police investigation had been dropped and no charges were ever laid.\(^\text{139}\)

The same adherence to the notion that being under investigation *itself* suggests that a person may be guilty can be seen in Moreham’s assertion that such an investigation is ‘designed to undermine the claimant’s interests, not to protect them’.\(^\text{140}\) It is true that, when investigating a person, the police are primarily seeking evidence that would incriminate them; hence a person who knows themselves to be guilty will of course view the investigation as a grave threat to their interests. But such a viewpoint again looks at the situation only through the lens of the guilty suspect. The *innocent* person, wrongly suspected, may welcome a full and speedy investigation in the hope it will quickly find there to be no real evidence to link them with the crime, hence exonerating them of involvement, as in *Sicri*. Indeed, it is known that the police sometimes investigate multiple persons, where only one can have committed the offence, simply to eliminate them from their inquiries.\(^\text{141}\)

So far then, we have seen that cases involving suspects under active investigation can raise difficult questions as to how possible guilt or innocence should be taken into account. This section suggests that the long-standing doctrine of the presumption of innocence can act as a helpful ‘guiding light’ for judges grappling with such problems. The presumption, sometimes described as a ‘golden thread’ running through our justice system,\(^\text{142}\) is a complex concept, which this article cannot address in depth.\(^\text{143}\) In its narrow sense, it is simply an evidential rule to the effect that the burden of proof at trial rests on the prosecution; that would not appear to have any relevance to civil proceedings like an MPI case. However, as Ashworth points out, a broader conception of the presumption of innocence has found favour in ECHR jurisprudence:

European human rights law also supports a second, wider sense of the presumption of innocence: that pre-trial procedures should be conducted, so far as possible, as if the defendant were innocent.\(^\text{144}\)

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\(^{139}\) Moreham (2019), n 13, at 151. She notes that investigations *may* be dropped for reasons other than insufficient evidence, such as victims’ unwillingness to testify, but there is no evidence this was the case here; indeed two accusers challenged the initial CPS decision not to charge. The CPS reviewed and upheld the initial decision as correct: https://www.telegraph.co.uk/news/2016/10/06/sir-cliff-richard-sues-the-bbc-and-police-after-raid-of-his-hous/.

\(^{140}\) Ibid, 147–8.

\(^{141}\) Above, n 12.

\(^{142}\) Woolmington v DPP [1935] AC 462.


While it may be said that media reporting on criminal investigations or proceedings is not itself part of ‘pre-trial procedures’, Strasbourg has observed:

In [Article 8 reputation] cases that concerned allegations of criminal conduct the Court also took into account that under Article 6 § 2 of the Convention individuals have a right to be presumed innocent of any criminal offence until proved guilty (see, among other authorities, Worm v. Austria and Du Roy and Malaurie v. France. 145

How exactly then can the presumption be taken into account in civil cases like these? Here the analysis of Weigend suggests a clear principle to apply:

The presumption of innocence … obliges the state to organise the criminal process in such a way as not to impose on suspects hardships that cannot be justified with respect to an innocent person. 146

This explains why it is acceptable for the state to search, arrest, detain and impose other hardships on those who are in fact innocent where the evidence at the time gives rise to the reasonable suspicion that legally justifies such actions. Such hardships are an unavoidable part of the criminal process; further, the hope is that the investigative process will quickly ascertain where an innocent person has been mistakenly caught up in the process, as in Sicri.

Such necessary investigatory steps, however, differ sharply from publicly naming the suspect, a step that, far from being an unavoidable part of police investigations, is actually contrary to police policy. And this is for good reason: since naming suspects is unnecessary but can cause them great harm – and risk actually damaging an investigation – there is no justification for doing so in normal circumstances under Weigend’s test. 147

Of course there may be particular circumstances in which the police could justify to a judge why there may be some investigatory or other public benefit that could accrue by releasing the name. In the vast majority of situations, however, it is difficult to see any benefit to a criminal investigation of naming the suspect: hence the hence the general police policy not to do so. 148
As private bodies, newspapers of course are not directly bound by the presumption of innocence generally or by duties to respect the Convention rights under the HRA more specifically. However, courts, as part of the justice system, should have regard both to the presumption of innocence as a general principle and are specifically bound to act compatibly with the ECHR rights, a duty they have notably sought to discharge through the development of MPI itself.

In recent times, courts have begun to consider how best to give recognition to the presumption of innocence in cases like these. Other than dicta from ZXC already noted, two further examples may be briefly noted. In Khuja, Lord Sumption for the majority openly questioned the long-standing assumption that the general public could distinguish between suspicion and guilt and hence not impute guilt to an individual who is merely under investigation. The minority were even more robust and endorsed a quotation by another judge writing extra-judicially:

False rape and abuse accusations can inflict terrible damage on the reputations, prospects and health of those accused. For all the presumption of innocence, mud sticks.

Similarly, Mann J in Richard succinctly explained why the presumption of innocence is, in a pragmatic sense, engaged in cases such as this.

If the presumption of innocence were perfectly understood and given effect to, and if the general public was universally capable of adopting a completely open and broad-minded view of the fact of an investigation so that there was no risk of taint either during the investigation or afterwards (assuming no charge) then the position might be different. But neither of those things is true.

Such dicta recognise the crucial point that it is simply the fact of being under official investigation that can irretrievably tarnish someone’s reputation, regardless of their actual guilt or innocence. Yes, in some MPI cases there may be the possibility of a future guilty verdict, but to argue for name publication before charge, in case claimants are later found guilty, is to turn the presumption of innocence on its head.

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149 It may be indirectly enforced via the law of contempt of court in cases of seriously prejudicial coverage: Contempt of Court Act 1981.
150 Per HRA s 6(1) only ‘public authorities’ are bound to act compatibly with the Convention rights.
151 s 6(3)(a) HRA; see above, n 97.
152 Above, text to n 54.
153 Khuja, above, n 35, [34].
154 Ibid, [52].
155 Richard, above n 30 at [248].
156 As we suggest below this scenario is unlikely to arise frequently and there are ways of avoiding it: text ff n 163.
5.3. Does protecting reputation via MPI wrongly bypass the tort of defamation?

As seen above, the protection of reputation is now quite firmly embedded in this aspect of English law. This can be seen, not least, from the significant award of damages for reputational harm secured by Cliff Richard when allegations made against him led to extremely intrusive live coverage (by helicopter) of the police search of his house by the BBC. Moreham believes, however, that Mann J in that case failed to account for English case law that has previously held that damage to reputation should be confined to actions in defamation (a point we contest above). She praises, by contrast, Nicklin J in ZXC at first instance, because he refused to make an award for reputational damage, on the grounds that it is a:

fundamental principle in the law of defamation that damages and vindication of reputation should not be awarded on a false basis: i.e. where the defamatory allegation can be proved to be substantially or partially true …

At this point it is necessary to explain an important point about how defamation law treats the reporting of, for example, the fact of having been arrested or being under investigation by the state. It might be thought that the bare reporting of such a fact could attract no remedy in defamation because it is true that the person was arrested and so the press would have a complete defence. However, this overlooks the fact that defamation law looks not simply at what facts were alleged but at the defamatory meaning or ‘sting’ of those facts. As Warby J explained in Sicri:

It is well-established in defamation law that the ordinary reader will normally understand a statement that a person has been arrested for a crime to mean that there are reasonable grounds for suspecting him of that crime.

Hence, it is not sufficient for a libel defendant seeking to use the defence of truth to say simply: ‘it is true the claimant was arrested or is under suspicion’. Rather,

such a statement can only be defended as true by proving that there were objectively reasonable grounds for suspicion; [and] the grounds to be relied on must focus on some conduct of the claimant by which he brought suspicion on himself.

In other words, in libel law, merely reporting the fact of an arrest (say), although itself true, does not itself give the defendant the defence of truth.

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157 See above, n 130.
158 ZXC v Bloomberg LP [2019] EWHC 970 (QB) at [149(iv)].
159 Sicri n 1 above, at [148]. Warby J is here referring to the so-called ‘Chase level meanings’ (from Chase v News Group Newspapers [2002] EWCA Civ 1772; [2003] EMLR 218); level one is imputation of guilt; level two (which Warby was describing) is reasonable grounds to suspect guilt; level three (the least serious) is grounds to investigate.
for the defamatory meaning such a story conveys – that there are reasonable grounds for suspecting the claimant of criminality. This is important because it helps explain why damages were awarded for purely reputational harm in *Richard* but denied in *ZXC*. The reason is *not*, as Moreham appears to suggest, that Mann J in *Richard* wrongly assumed the claimant to be innocent, while Nicklin J in *ZXC* was alive to the possibility that he might well be guilty and hence refused damages for harm to what may have been an undeserved reputation. Rather, as Warby J points out in *Sicri*, the two decisions are reconcilable,\(^{160}\) for reasons that require a little explanation.

In *Richard*, the BBC only asserted that the ‘*bare fact*’ of the investigation was true. The coverage did not include details of Richard’s alleged conduct giving rise to reasonable suspicion of his guilt and he vehemently denied that there was any. The BBC’s coverage would not therefore have sufficed to avail them of the defence of truth had proceedings been brought for defamation; hence the protections in that tort were not bypassed or undermined\(^{161}\) by allowing protection for reputational harm via MPI. And MPI remained a suitable action to bring because of the clear intrusion into Richard’s privacy inherent in the live broadcasting of the search of his home.

In contrast, in *ZXC* the claimant expressly advanced his case on the basis that ‘the truth or falsity of the underlying information [the suspicious matters being investigated] was not a relevant issue’\(^{162}\). In other words, he did not expressly deny having engaged in the alleged suspicious activity, he simply said that matter was not relevant to his claim that publishing the fact of his being under investigation by the UKLEB was a breach of his privacy. Hence the decision that ZXC could not claim damages purely for reputational harm and vindication: such damages are awarded only in respect of a defamatory meaning that the claimant pleads is false. Thus, in *ZXC* the claimant was entitled only to damages for distress, loss of dignity and embarrassment. A similar result was reached in *Sicri*.

We recognise, that, despite our argument in 5.2 above invoking the presumption of innocence, some readers may still be concerned about the idea that, as Warby J put it, ‘a terror suspect whose identity as such is wrongfully disclosed, in breach of his privacy rights, but who is later charged and rightly convicted’ may be awarded damages in an MPI case.\(^{163}\) Four points may be made in response. First, as seen above, damages purely to vindicate reputational loss may not ordinarily be awarded in MPI cases (the exception being cases like *Richard*, as explained). Second, in many cases, claimants will be

\(^{160}\)Ibid (*Sicri*) at 145–151.

\(^{161}\)Warby J added that the BBC did not argue that they would have had any other defence in defamation had the case been brought that way: ibid, at [148].

\(^{162}\)Ibid at [151].

\(^{163}\)Ibid at [156].
seeking not damages but only injunctive relief. Third, in many cases, it will already be clear by the time the civil case comes to trial that the claimant faces no prospect of later being charged or convicted; the criminal proceedings may well simply have been dropped by then for lack of evidence – as in both Sicri and Richard. Thus, it is likely to be in only a very narrow category of cases that the spectre of awarding damages in respect of harm to an undeserved reputation may seem real. If, in such a case, there is real concern that an MPI claimant might be found guilty in still-active criminal proceedings, our fourth and final suggestion is that any hearing for a civil claim for damages could simply be deferred until after the criminal proceedings had concluded. If for some reason that was not possible, there might be creative procedural ways of ensuring that damages were not, in practice ever left in the hands of a claimant who was subsequently convicted.

Let us consider the point the other way around. Given the ‘Chase level’ rules about defamatory meaning just explained, could it be said that claimants in the position of Cliff Richard should simply have sued in defamation, full stop? The answer is no; first, because cases like Richard’s also raised clear issues of intrusion into the private sphere of the home; and second because by claiming through MPI they are not bypassing anything essential: as explained the defence of truth would not in any event have been available to the BBC in that case, and public interest defences can be used both in MPI and in defamation, though differing somewhat in emphasis.

Whichever way the case is brought, a crucial point remains the same: it is only for publishing the fact of arrest, investigation etc that the press may be liable; publishing accurate details of the underlying conduct of the claimant that gave rise to the suspicion would not generally attract a remedy in either MPI or defamation. This, finally, helps answers Moreham’s argument, cited above, that ‘In the vast majority of cases (if not all) suppressing the fact that a person is being investigated … prevents the public from finding out about possible wrongdoing’. This is a major overstatement: as both the High Court and Court of Appeal made clear in ZXC, the press has always been able to publish accurate details about the suspicious activities of the

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164 Where this is so, in MPI cases in which reputational damage was a key concern, courts would have to consider carefully the implications of the defamation law ‘rule in Bonnard v Perryman’ that, where the defendant intends to justify, an injunction should not be granted.
165 These could perhaps include payment of damages into an escrow account that would only pass them on to the claimant should active criminal proceedings be dropped, or s/he acquitted; or requiring a formal undertaking from such claimants that any damages paid to them would be repaid should they be convicted.
166 Because the reports did not satisfy the evidential requirements for making out the defence of truth: above, text to and n 159.
168 Moreham (2019), above n 13, at 155.
169 ZXC (2019) above, n 9 at [126].
170 ZXC, above, n 10, at [112].
relevant company based on their own investigations. And this is the general rule: any accurate details of wrongdoing that the press can itself discover can be freely reported, without liability in MPI or defamation; it is only reporting the fact of arrest or investigation that is actionable.

6. Conclusion

The common law has for some time now been moving incrementally towards establishing that a suspect or defendant has the right to anonymity until charge; recent decisions by the senior courts have now confirmed the change. The matter now rests with the final authority of the Supreme Court. The fundamental driver of this move has been the manifest injustice suffered by ordinary people whose lives have suffered extraordinary damage by reports of criminal investigations into their lives, even where it has subsequently become clear they are innocent. The developments this article has traced show the judiciary to be more than capable of taking the necessary steps to remedy such injustice. In doing so, the courts have been merely giving effect to the broad consensus that has formed amongst those who have examined this problem, including the police themselves, strongly supported by general public opinion. Confirming these developments requires no bold step from the Supreme Court: the caselaw to date has required only an incremental extension of the common law precisely because MPI, and the Article 8 right to which it gives domestic effect, have long since expanded beyond a conception of privacy that confines it to narrow categories of intimate, familial or bodily aspects of human life.

However, because the truth or falsity of criminal allegations is indeterminate until the end of the proceedings in question, others have argued that providing for anonymity until charge to protect the reputation of claimants rubs uncomfortably up against the tort of defamation. In response we have argued that the guiding light of the presumption of innocence means that the claimant is entitled to be treated by the legal system in the same way as someone who is actually innocent. Hence, they should be able to seek a remedy against those who undermine their reputation and damage their private lives by publishing the fact that they have been investigated by the authorities, without restricting them from reporting any other matters they wish. For those unconvinced by this argument, we have offered a more practical response to the concern that damages will thereby be awarded to the undeserving. In short, by providing a remedy for the injustice that individuals have long faced in this area, the judiciary to date have taken a wise and humane approach – one which now awaits only the imprimatur of our highest court.
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**Notes on contributors**

*Gavin Phillipson*, Professor of Law, has published widely in leading journals in the UK, US, Canada and Australia and is co-author of *Media Freedom under the Human Rights Act* (2006, OUP), with Helen Fenwick. His work on privacy has been cited in judgments by the High Court, Court of Appeal and House of Lords in the UK and by the New Zealand Court of Appeal.

*Robert Craig*, Lecturer in Law, has published in a number of leading journals in the UK on general issues of public law, including the *Modern Law Review and Public Law*. He has been cited twice by the UK Supreme Court and is currently working on a monograph entitled *Royal Law*. 