That still leaves a substantial risk of losing. If a firm acts on a CFA and loses, it will have worked for nothing—often for over a year. Most law firms have lost CFA cases they thought they had a good chance of winning, and hence got nothing—this included not just loss at trial, but also earlier "walk-aways" where the claimant's lawyers come to appreciate as litigation progresses that the claim is legally or evidentially problematic or disproportionate. Even when the firm wins the case for its client, it will have not been billing for a year or more. The success fee is to balance those disadvantages.

In my view therefore, wrongly caricaturing the process as a "racket" is unhelpful to the debate. It wholly fails to take into account the economic realities of the process for the vast majority of law firms (as well as the fact that the CFA provides a genuine means of offering access to justice to those who would otherwise lack it).

March 2009

Written evidence submitted by Mark Thomson

From the outset, I wish to clarify that I am making the below submission as an individual, and not on behalf of the McCann's who, as you may be aware, are clients of Carter-Ruck. For professional reasons, I cannot comment on any of the specifics of the McCann case.

I have worked in media law for over 20 years and have been involved in complaints to the various regulators for invasion of privacy and inaccuracy, as well as many significant court actions for privacy, defamation and harassment (e.g *Naomi Cambell v Mirror Group*, *Loreena Mckennitt v Ash*, *Sienna Miller v Newsgroup and Big Pictures*; *Marco Pierre White v New York Times* and *Amar v BBC*). I have acted for both individuals as well as broadcasters (Carlton TV) and publishers (OUP and Penguin). I have also written numerous articles on media law and contributed to the book *Privacy and the Media—The Developing Law* edited by Hugh Tomlinson QC. I make this submission based on my own experience.

Why the self-regulatory regime was not used in the McCann case, why the PCC (PCC) has not invoked its own inquiry and what changes news organisations themselves have made in the light of the case?

While I cannot comment on the specific case, I would point out that the PCC, set up and funded by the media, does not award compensation for damage to reputation, make declarations of falsity, issue penalties, or grant injunctions. Indeed, the PCC does not want to exercise these functions. The PCC either mediates to provide for publication of apologies or, in rare cases, issues an adjudication that the newspaper must publish, although recently a newspaper publicly disagreed with the content of a PCC adjudication.

In claims for defamation, the most effective form of vindication is an award of damages and a substantial award sends the message to the world that the allegations are untrue and should not be repeated.[47]

Accordingly, whilst the PCC sets a minimum standard of conduct for journalists and the PCC code has improved considerably over the years, in my view, it does not provide effective remedies for libel or for invasion of privacy. This is also the view of the European Court of Human Rights[48] in relation to privacy.

Reputation is an important right which is now guaranteed by Article 8 of the European Convention on Human Rights (ECHR). It takes a long time to obtain a good reputation and a short time to lose it; it is therefore essential for an individual to have access to the courts and to have effective remedies that effectively restore his or her reputation.

Whether the successful action against the Daily Express and others for libel in the McCann case indicates a serious weakness with the self-regulatory regime

No comment, for professional reasons.

The interaction between the operation and effect of UK libel laws and press reporting

UK libel laws, which have developed from a combination of common law and statutory law (such as the Defamation Act 1996 and the influence of Article 10 of the ECHR), remain consciously and carefully balanced in order to allow an individual to seek remedies when a defamatory allegation has been made against him, but also to allow reasonable investigative journalism that is in the public interest.[49]

Libel laws are needed in order to hold the press to account when they make serious errors, damaging and destroying peoples' reputations, and sometimes their livelihoods.

Where a newspaper or broadcaster reports allegations that are in the public interest, and where the

[47] See 9.1, p 263 of *Gatley on Libel and Slander*, Eleventh Edition, Sweet & Maxwell [2008]
[48] See *Peck v United Kingdom* (44647/98) [2003] E.M.L.R. 15
[49] *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127

newspaper or broadcaster has acted responsibly, they will have a defence to any claim in libel, even where the defamatory allegations are untrue. This development in the law is significant protection for the media. However, where defamatory and untrue allegations are made in error, the claimant should have a right to vindicate his reputation by legal redress. The media also have the advantage of the offer of amends regime brought in by the Defamation Act 1996, which has reduced libel awards.

These developments mean that responsible press reporting is much less vulnerable to legal claims. On the other hand irresponsible, defamatory and intrusive reporting are, and have always been and deserve to be, vulnerable to legal claims. Newspapers, in particular tabloid newspapers, have huge circulation and therefore huge power to affect people's live. They also have huge resources.

The impact of conditional fee agreements on press freedom, and whether self-regulation needs to be toughened to make it more attractive to those seeking redress

Conditional Fee Agreements (CFA's) provide access to justice including access to courts which provide effective remedies for libels and invasions of privacy. This is a right guaranteed by Article 6 of the ECHR. There are numerous examples of successful claims, where if such a scheme had not existed, a claimant would have been deprived of legitimate redress. CFA's also allow victims with modest means to be on a level playing field with their media opponents.

As mentioned above, the PCC and other regulatory bodies do not provide sufficient and effective remedies.

Moreover, it is doubtful whether, contrary to numerous statements by the media, conditional fee agreements have a chilling effect on freedom of expression. When newspapers act responsibly and notify their target of proposed publication of the material, they are likely to have a defence in libel. If they notify their intended victim of any intended private disclosure, then any problem will be quickly resolved, probably by agreement and, if necessary, by a speedy Court hearing.

The observance and enforcement of contempt of court laws with respect to press reporting of investigations and trials, particularly given the expansion of the internet

This point is best addressed by in-house lawyers who have to deal with these issues on a daily basis.

What effect the European Convention on Human Rights has had on the courts' views on the right to privacy as against press freedom

In general, the ECHR has had a larger effect on the courts' views in favour of press freedom than on the right to privacy. Since the late 1980s, early 1990s, the media has been relying successfully on Article 10 to defend itself against state injunctions (*Spycatcher*), source disclosure orders (See *Mersey Care NHS Trust v Ackroyd*[50] and *Goodwin v UK*[51]), and excessive libel damages (*Tolstoy Miloslavsky v UK*[52] and *John v MGN*[53]), as well as to help establish the defence of responsible journalism (*Reynolds*[54] and *Jameel*[55]).

Moreover, despite a lot of recent ill-conceived criticism from the tabloid press the Human Rights Act (HRA) and, in particular, Section 12 of the HRA has further increased the protection of the press, since injunctions for threatened breaches of confidence have become more difficult to obtain than they were before the HRA came into force. In addition, reporting restrictions are now more heavily scrutinised than before.

In contrast, in relation to privacy, the effect of the ECHR has been to accelerate the continuing development by the common law of claims in confidence, now renamed the misuse of private information. It is important to remember that, prior to the 1980's and 1990's, spurred on by the intrusive activities of the tabloid press (and in parallel to numerous parliamentary reports highlighting concerns over invasions of privacy), the law of confidence was already developing considerably, in such cases as *Spycatcher, Stephens v Avery*[56] and *Barrymore v Newsgroup Newspapers*[57]. Indeed, this was the submission of the (Labour) Government to the European Court of Human Rights in *Spencer v UK*[58].

The recent decisions of the ECHR such as *Peck v UK*[59] and *Von Hannover v Germany*[60] have undoubtedly increased the level of protection of privacy for all people, whether those in the public eye or not. However, the precise impact of these cases is still being worked out by the Courts. It is clear that where there is a genuine public interest, the media has nothing to fear.

[50] *Mersey Care NHS Trust v Ackroyd* [2007] HRLR 19
[51] *Goodwin v United Kingdom* (17488/90) [1996] 22 E.H.R.R. 123
[52] *Tolstoy Miloslavsky v United Kingdom* (A/323) [1996] E.M.L.R. 152
[53] *John v Mirror Group Newspapers* [1997] Q.B. 650 CA
[54] *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127
[55] *Jameel v Wall Street Journal Europe* [2006] UKHL 44
[56] *Stephens v Avery* [1988] Ch. 449
[57] *Barrymore (Michael) v News Group Newspapers Ltd* [1997] F.S.R. 600 Ch D
[58] *Spencer v United Kingdom* (28851/95) (1998) 25 E.H.R.R. CD105 Eur Comm HR
[59] *Peck v United Kingdom* (44647/98) [2003] E.M.L.R. 15
[60] *Von Hannover v Germany* (59320/00) [2004] 16 BHRC 545

It is therefore somewhat ironic that some sections of the media want the Human Rights Act repealed or amended since, if they were to be successful, it may well have the effect of make obtaining injunctions easier to obtain.

Whether financial penalties for libel or invasion of privacy, applied either by the courts or by a self-regulatory body, might be exemplary rather than compensatory

Libel law currently allows for a claimant to seek exemplary damages where the defendant's defamatory publication has been done "with guilty knowledge, for the motive that the chances of economic advantage outweigh the chances of economic, or perhaps physical penalty."[61]

Such cases are rare and exemplary damages awards are, in any event, vulnerable to appeal. A claim in aggravated damages will only really be available where the conduct of the newspaper is reprehensible. It is important that a claimant has the right to seek exemplary damages for very serious defamations as this limits the possibility that a media organisation will take a commercial decision to publish an allegation regardless of its truth.

At present, the law does not allow for exemplary claims for breach of confidences/invasions of privacy as is clear from the decision of Mr Justice Eady in *Mosley v Newsgroup Newspapers Limited*[62]. However, a claimant in a privacy/confidence claim can seek an account of profits as an alternative to compensatory damages which could have much the same financial effect on the defendant as exemplary damages. However, claims for accounts of profits are complex and difficult to pursue.

It should be noted that whilst self-regulators such as Ofcom/ITC have imposed very substantial fines, which almost certainly have a punitive element, these fines do not offer any compensation to the victim. The PCC do not, and do not wish to have, any power to fine newspapers or award compensation. (This is not surprising considering they are funded by newspapers.)

The writer's view is that the tabloid press have got worse with regard to privacy in the last few years, especially given technical advances in the last few decades of high powered digital cameras, unlawful surveillance devices, email communication and the internet.

There is a massive and continuing unlawful trade in highly sensitive information as demonstrated by the Information Commissioner in his two significant reports to parliament "What Price Privacy" and "What Price Privacy Now". I am also aware of this trade, from my own experience.

I set out below a brief extract of a table exhibited at page 9 of his second report "What Price Privacy Now" (2006). The Information Commissioner describes that table as follows:

> "The following table shows the publications identified from documentation seized during the Operation Motorman investigation, how many transactions each publication was positively identified as being involved in and how many of their journalists (or clients acting on their behalf) were using these services.
>
> It should be noted that while the table is dominated by tabloid publications, they are far from being alone. Certain magazines feature prominently and some broadsheets are also represented. The Commissioner recognises that some of these cases may have raised public interest or similar issues, but also notes that no such defences were raised by any of those interviewed and prosecuted in Operation Motorman"

Publication	*Number of transactions positively identified*	*Number of journalists/ clients using services*
Daily Mail	952	58
Sunday People	802	50
Daily Mirror	681	45
Mail on Sunday	266	33
News of the World	228	23
Sunday Mirror	143	25
Best Magazine	134	20
Evening Standard	130	1
The Observer	103	4
Daily Sport	62	4

In these circumstances, where a very serious invasion of privacy has taken place, and the defendant has not given the claimant any prior notice, and thus has denied the claimant the opportunity to restrain publication, I believe that exemplary damages should be available to act as a deterrent. This will probably require Parliament to legislate for this. Otherwise, the now standard and increasing tabloid media practice of publishing private information without any prior notice will continue unchecked.

[61] *Broome v Cassell* [1972] A.C.1027
[62] *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB)

Whether, in light of recent court rulings, the balance between press freedom and personal privacy is the right one

In my view, the balance reached by the Courts between press freedom and personal privacy has improved considerably.

The Courts have made it clear that there is a presumptive equality between press freedom and personal privacy. Each case is judged on its facts alone and whether the particular intrusive publication is justified by a genuine public interest or some other factor, such as the material is in fact in the public domain. Consequently, some information will be restrained and some will not, depending on the particular facts of the case.

Parliament has also introduced two important laws protecting privacy, the Protection From Harassment Act 1997 and the Data Protection Act 1998 which have helped.

Nevertheless, it would be a significant improvement if the privacy codes of Ofcom and the PCC included a provision that a journalist/newspaper had to approach the target before publishing defamatory and/or private material.

This is consistent with the concept of reasonable journalism in *Reynolds* and is a matter of basic fairness. The tabloid media refrain from notification in order to avoid the risk of a complaint or even to avoid an injunction. The consequence is that people's private information is released permanently without any chance of the victim remedying the situation.

Written evidence submitted by Russell Jones & Walker, Solicitors

Introduction

1. Russell Jones & Walker is a medium sized firm of solicitors with offices in London, Manchester, Birmingham, Bristol, Cardiff, Sheffield, Newcastle, Wakefield and an associated office in Edinburgh.

2. The defamation and privacy department is well known for its claimant work, but also regularly acts for defendants. It is consistently rated as one of the best and busiest in the country.

3. Our diverse national client base includes both private clients and members of unions and membership organisations. In the latter category, we are particularly known for the work we do for the Police Federation and its members (being police officers up to the rank of Chief Inspector). However, we also act for the NASUWT, RCN, GMB (Southern Region), League Managers' Association, Prospect (including the Premiership Referees Group), Musicians' Union, Community and PCS.

4. The private clients we act for tend to be ordinary individuals rather than celebrities.

5. Over the years we have successfully pursued claims against virtually every national newspaper and TV company and a huge number of local papers, magazines and book publishers.

6. We are experienced in advising on and addressing the funding difficulties which ordinary people of modest means face when contemplating an action to restore their reputation.

7. Our submissions below adopt the headings used in the Committee's Announcement No.67 dated 18 November 2008. We have not responded to all the matters raised.

The interaction between the operation and effect of UK libel laws and press reporting

8. In a free and democratic society press freedom is essential and the media's importance is often demonstrated by the impact of investigative journalism. The media are not simply reporters of the news, but can create the news by uncovering misconduct and calling to account those holding positions of authority.

9. Yet with such great power comes responsibility. The law of defamation is a necessary balance to freedom of speech to ensure an individual can protect their reputation. It should not be viewed as a yoke around the neck of the media, but rather a system of checks and balances to help ensure the highest standards of journalism.

10. We have a powerful, influential and robust press in this country which not surprisingly presses the case for more freedom and less restriction at every opportunity. Potential claimants do not of course have the same platform or influence to advance their position. They must rely on the Courts to achieve the right balance. In our experience, that balance between the operation of the libel laws and press freedom is deployed justly and fairly by our Courts and the specialist judges.