

Privacy Injunctions - The New Black

December proved a busy time in the evolving law of privacy, with two Court of Appeal decisions, *McKennitt v Ash* [2006] EWCA Civ 1714 and *Prince of Wales v Associated Newspapers* [2006] EWCA Civ 1776, and an interim injunction granted to protect a celebrity adulterer, *CC v AB* [2006] EWHC 3083.

The approach to determining claims for privacy or “misuse of private information” is now well-established as a two stage process, incorporating the jurisprudence of articles 8 and 10 of the European Convention on Human Rights. First the claimant must show that he has a reasonable expectation of privacy in the information concerned, *Campbell v MGN* [2004] UKHL 22 (para. 21). Once this threshold is crossed, the parties’ competing article 8 and 10 rights must be weighed in the “ultimate balancing exercise”. This considers the importance of the specific rights asserted and the proportionality of restricting them, *Re. S* [2004] UKHL 47 (para. 17).

A low threshold

Recent decisions risk making the threshold stage only a minimal hurdle because the “reasonable expectation” test is transforming into the question whether article 8 is engaged at all.

Since the Human Rights Act, English courts have had to take account of Strasbourg jurisprudence when considering Convention rights, but in *McKennitt* the Court of Appeal stated:

“... in order to find the rules of the English law of breach of confidence we now have to look in the jurisprudence of articles 8 and 10. Those articles are now not merely of persuasive or parallel effect but as Lord Woolf says, are the very content of the domestic tort that the English court has to enforce.” (emphasis added)

It then phrased the threshold test as “is the information private in the sense that it is in principle protected by article 8”. It later asked “whether article 8 was engaged”. The difference between these questions, and whether the claimant has a legitimate expectation of privacy, is illustrated by looking back at *A v B & C* [2005] EWHC 1615 in which Eady J. held that the threshold required considering the particular claimant’s legitimate expectations and not merely the subject matter of the information, which is a far easier test.

Misuse of Private Information Claims

It is of course easier to establish that a substantive Convention right is “engaged” than that it has been breached. However, the two are now in danger of being conflated in misuse of private information claims. The effect of a claimant passing the threshold stage appears to be that he has shown a breach of article 8 (unless subsequently justified under the balancing exercise), yet the question being asked is not, “Was there a breach?” but “Was article 8 engaged?” No wonder interim injunctions have become easier to obtain.

Broad Interpretation

Strasbourg has interpreted article 8’s protection of “respect for private and family life” very broadly. In *von Hannover v Germany* (2005) 40 EHRR 1 it extended this to the most anodyne of information when it enjoined photographs that showed Princess Caroline playing sport and going shopping. Only a few weeks earlier a different view had emerged in *Campbell*; Baroness Hale stated that if the published photograph had shown Ms. Campbell popping out for milk, rather than leaving a Narcotics Anonymous meeting, she would have had no legitimate expectation of privacy. Despite this, the Court of Appeal in *McKennitt* (paras 39-42) held, somewhat surprisingly, that *Campbell* made no

specific finding about the content of article 8 and, although not necessary to the appeal, implicitly preferred von Hannover as authority for article 8's content.

The implications are stark. Only six months before McKennitt, Elton John failed to obtain an injunction restraining publication of a photograph showing him on the street outside his home, partly because he had no legitimate expectation of privacy in that information, *John v Associated Newspapers* [2006] EWHC 1611. Today, it appears that he could satisfy the threshold test.

McKennitt's consideration of article 8's scope included reference to *Scaccia v Italy* (App. No. 50774/99). In *Scaccia* the applicant complained of the publication in newspapers of her photograph, taken by the Italian police during its investigation into her for offences including fraud. It was an "identity photograph"; its informational content was therefore limited to the applicant's face. The European Court held that its publication fell within the applicant's private life and breached her article 8 rights. If *Scaccia* is authority for information, about which a person may have a reasonable expectation of privacy, then the threshold test has certainly been lowered.

Such a low threshold, where the law protects mundane portrayals of a person's daily life or face, sits uneasily with *M v Secretary of State for Work and Pensions* [2006] 2 AC 91 (HL) (cited in McKennitt) in which it was held, albeit in a different cause of action, that the protection of article 8 arose only if the interference were sufficiently serious (para. 83). Furthermore, it conflicts with the Court of Appeal's approval in McKennitt of Eady J's refusal at first instance to protect certain information because it was too anodyne.

Only days before McKennitt in *CC v AB*, a well-known figure obtained an injunction restraining the husband of a woman, with whom he had had an affair, from publishing any information about it. At the time the decision was noteworthy because Eady J., in deciding that the claimant had a reasonable expectation of privacy about the affair, disavowed the making of judicial moral judgments about different types of sexual relations. However, while thereby holding that all sexual relationships are prima facie private, Eady J. retained the possibility that a particular party might not have a legitimate expectation of privacy in some (undefined) circumstances. The judgment retained the subjective element of the legitimate expectation test. If article 8, as defined in Strasbourg, becomes the threshold test, then the test is barely a hurdle, because the scope of article 8 is so wide and because this subjective element is lost.

Image control

The weakening of this subjective element means that a person (read "celebrity") is better able to control his public image (leaving aside the important issue of whether personal information is property, for which we await the House of Lords judgment in *Douglas v Hello!*). In addition, McKennitt enhanced this ability by rejecting the concept of "zones" of private life, whereby a person forfeits his right to privacy in one area of his life, by putting some related material into the public domain.

Gavin Phillipson in *Judicial Reasoning in Breach of Confidence Case under the Human Rights Act: Not Taking Privacy Seriously* (2003) Supp. EHRLR 53 at 70 emphasised that the right to control information because "the very notion of the right to informational autonomy, or selective disclosure, [is what] most commentators see as lying at the heart of the right to privacy." In McKennitt, the claimant gave evidence that she had previously only put limited information "which she was comfortable with" into the public domain. The question now is to what extent a person may be "comfortable with" putting extensive information about himself into the public domain, e.g. about adopting a child or his religion, thereby enhancing his public profile, but then be able to restrain anything which damages his reputation. Where the rights of children are invoked, the ability to control information is even easier because the court will take into account their article 8 rights (and

those of other family members who are not parties). Even if the claimant has used his children to enhance his image in the past, this is unlikely to outweigh their article 8 rights.

For a claimant seeking an interim injunction, the practical significance of being able to pass the threshold test easily is great, because, when it comes to the second stage, the courts are likely to be sympathetic to arguments about the need to “hold the ring”.

The balancing exercise (the second stage)

The balancing exercise, weighing article 8 and 10 rights, provides for consideration of factors like the degree of intrusion suffered and the defendant’s right to tell his own story. However, despite the fact that the wrong is the misuse, by publication, of private information, the courts in their application of the balancing exercise have been influenced by extraneous factors. In *Campbell*, although the taking of the photographs formed no part of the claim, the fact they were taken covertly appears to have influenced some of their Lordships’ analysis of the photographs’ intrusiveness. The decisions in *CC v AB* and *McKennitt* appear to have been influenced by the defendants’ motivations for wishing to publish the information, said to have been revenge and resentment respectively. Although the analysis of such issues is not wholly clear, it is very clear that claimants should include evidence about the surrounding circumstances to enhance the chances of obtaining interim injunctions.

What role for “the public interest”?

In traditional breach of confidence claims, the public interest defence will only succeed if the disclosure is “required” in the general interest. What is “required” is obviously very different from what is, on the balance of two rights, acceptable. Yet in *McKennitt* we saw the possibility that the traditional public interest defence could become identified with a defendant’s article 10 rights in a misuse of private information claim. This would cause serious difficulties to defendants (except in cases of “serious news”). Sometimes, defendants will need to avoid using this terminology.

There are points of comfort for defendants. First, *McKennitt* was really a breach of confidence claim “in the traditional understanding of the expression” and so the application of the test of “requirement” was appropriate. Second, in *Prince of Wales v Associated*, the Court of Appeal reiterated that under the HRA the public interest test has changed from the need to show exceptional circumstances which require disclosure of the information to a test of whether a fetter on the right of freedom of expression is “necessary in a democratic society” (para. 67).

However, the risk of equating the public interest defence too closely with article 10 rights remains and the reason is, again, *von Hannover*. In it the European Court held that “the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution the published photos and articles make to a debate of general interest” (emphasis added). One reading of *von Hannover* suggests that this factor would always be decisive, although we suggest (per *Campbell*) that no single factor should be “decisive” in advance of weighing all considerations.

The intrinsic value of the information concerned is (and should be) a factor when weighing up competing rights; privacy should yield more easily to political speech than to gossip. However, the balancing exercise should in theory allow information which contributes nothing to a debate of general interest (e.g. *Victoria Beckham shopping*) to be published because on balance the information is not intensively private and/or the event was sufficiently public and/or the nature of the information means that it merits legal protection and/or the claimant has previously sought the limelight. Defendants should beware the application of the higher public interest defence.

Injunctions

It is uncontroversial that interim injunctions in privacy have become easier to obtain. What is controversial is the extent to which claimants can now circumvent the rule in *Bonnard v Perryman* [1891] 2 Ch. 269 (by which interim injunctions in defamation are difficult to obtain) and restrain publication of information which is defamatory and private (whether true or false) by framing their claim as misuse of private information.

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