

## GD MEDIA LAW BULLETIN 12

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GD Media Law Bulletin is a news review compiled quarterly by Goodman Derrick's Media Group. The aim of the Bulletin is to provide a brief summary of interesting developments in media law and regulation. The Bulletin is directed at journalists, producers and compliance officers. Detailed guidance on how those developments may impact upon programme makers and broadcasters is available from any member of the Media Group.

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### Introduction

In our Winter 2001 bulletin, we reported on developments concerning the way in which the law seeks to protect individuals' private lives. We are again dedicating an entire bulletin to this topic because of further important developments.

In our Winter 2001 issue, we explained how (in the case of *Zeta-Jones & Douglas -v- Hello!*) there were signs that the courts might develop a new law of privacy in England to take account of the competing rights to private life and freedom of expression brought into English law by the Human Rights Act ("HRA"). The balancing of the rights conferred by the HRA was also a feature of the decision to protect the identities of Jamie Bulger's killers, Venables and Thompson, following their release from prison - but in this case, the court did not base the decision on the idea of a developing law of privacy, talking instead in terms of the long-established law protecting confidential information.

The recent decisions discussed below clearly suggest that the latter approach is the one which will be followed. In *A -v- B & C* the Lord Chief Justice, Lord Woolf, went so far as to say that it is almost certainly pointless to debate whether or not there is a law of privacy because in most if not all cases where the protection of privacy is an issue "an action for breach of confidence now will... provide the necessary protection".

In the same case, he made it clear that individuals, particularly celebrities, face a high barrier if they want to show that their right to keep facts private should outweigh the freedom of the press to report not only material which is in the public interest but also material which is merely of interest to the public.

This is positive news for the media; set against this, we consider at the end of this bulletin two recent laws (about data protection and harassment) which could be used to cause problems for journalists.

### PROTECTING PRIVATE LIFE

A recent spate of disputes between celebrities anxious to prevent the publication of embarrassing stories and red top editors equally anxious to dish the dirt, have helped to establish what areas of a person's life are a legitimate target of press attention, and what others will be protected as private. In this task the courts have sought to expand the parameters of the law of confidentiality, so that within an action for breach of confidence, they can strike a balance between Article 8 of the European Convention on Human Rights which guarantees a right to privacy and Article 10 which guarantees freedom of speech. Section 12 (4) of the HRA states that, in striking this balance, *"the Courts must have particular regard to the importance of the convention right of freedom of*

*expression."*

This balancing act is best illustrated by a review of the following recent decisions:

### **Theakston v MGN Ltd**

In *Theakston*, Ouseley J refused to grant an interlocutory injunction preventing the *Sunday People* from publishing a 'blow by blow' account of the TV presenter's exploits in a Mayfair brothel based on an interview with one of a number of prostitutes who had ministered to him there.

The judge concluded that *"in the resolution of the conflict between Article 10 and Article 8, the freedom of expression of the Sunday People and of the prostitute would be given greater weight than the extra degree of intrusion into the claimant's privacy"*.

In his judgment Ouseley J referred to a spectrum of sexual relationships ranging from marriage to a transitory engagement in a brothel. This latter end of the spectrum fell outside what the English courts would be prepared to protect through the law of confidentiality. Confidentiality has to be judged from the point of view of both parties to a relationship. In this case the prostitutes clearly took a different view of the confidentiality of what they had seen and done from that of Mr Theakston. The judge said that in the absence of any express stipulation of confidentiality he was not prepared to give him legal protection - a clear warning to celebrities of the potential kiss-and-tell dangers of short term flings.

The judge did draw the line at allowing the publication of photographs of Mr Theakston in flagrante. One of the reasons for allowing the article but not the photos was the fact that the claimant had never placed similar photographic material in the media before whereas he had been willing to discuss his sex life in written articles. However, the courts are increasingly reluctant to allow the publication of covert photographs taken without the subject's consent, and in this instance Ouseley J considered that publication of such photographs would constitute "a peculiarly humiliating and damaging" intrusion into Mr Theakston's privacy.

### **A -v- B & C ("Footballer A")**

If the dangers of playing away were not clear enough in *Theakston*, the Court of Appeal soon highlighted the importance of an unblemished home record when it overturned an injunction preventing a lap-dancer and a nanny from selling the story of their affairs with a married premier league footballer, later revealed to be Gary Flitcroft. Although Mr Flitcroft's relationships with these women were relatively long lasting compared to Mr Theakston's brief encounter in Mayfair, Lord Woolf still found that they were too far towards the transitory end of the sexual spectrum to constitute safe sex for the purposes of the law of confidentiality.

While Lord Woolf's judgment has been seen as a clarion call for the freedom of the press it has also been interpreted as a shot in the arm for kiss-and-tell journalism. Indeed he justified the 'Love Rat' genre of newspaper articles by associating it with the public interest as a booster of newspaper sales. In striking the balance between Article 10 and Article 8, he collapsed the traditional separation between the public interest and what is interesting to the public: *"The courts must not ignore the fact that if newspapers do not publish information which the public are interested in there will be fewer newspapers published, which will not be in the public interest."*

Gary Flitcroft argued that during his career as a footballer he had never courted publicity, and there was no legitimate public interest in exposing details of his sex life to public scrutiny. Lord Woolf disagreed, finding that a celebrity can become the legitimate subject of public attention regardless of whether he had ever actively sought such attention in the past. The judge's words are yet another

warning to celebrities about their lifestyle: *"The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model... He may set the fashion... Footballers are role models for young people."*

This may not be the last word. An appeal is pending to the House of Lords: we will report on the outcome.

## **Campbell v MGN**

Following an earlier victory against a former employee who sought to sell her story to The Mirror in breach of a confidentiality agreement, Naomi Campbell recently returned to court to sue Mirror Group Newspapers. This time the paper had published a story revealing her as a recovering drug addict. Details of her treatment and attendance at Narcotics Anonymous meetings were published, accompanied by the inevitable long-lens photographs of her leaving a group meeting.

Morland J accepted that the Mirror was entitled to reveal in strong terms the fact that Naomi Campbell was a drug addict, partly in order to correct the misleading impression Miss Campbell had previously given the public that she was not a drug user. However, the judge drew the line at the publication of photographs and details of her treatment. The judge found that even an international celebrity *"who courts and expects media exposure" should be left with "a residual area of privacy if its revelation would amount to a breach of confidentiality"*. The information given to the Mirror *"clearly bore the badge of confidentiality"*, as the source for the story was almost certainly a member of Miss Campbell's entourage or a fellow patient. The use of secret photography was a further aggravating factor, making the story particularly intrusive. The *"breach of confidentiality and the private nature of the information"* justified interference with the newspaper's Article 10 right of freedom of expression in contrast to the facts of the Theakston and Footballer A cases.

Despite winning the case, Naomi Campbell's victory was somewhat pyrrhic, as she was awarded meagre damages (£3,500 for breach of confidence and the Data Protection Act) and branded a liar.

## **THE DATA PROTECTION ACT 1998**

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At first sight this does not seem an obvious weapon for individuals against the media - until you remember that virtually all information and pictures held by the media about an individual count as "data" under the Act. The Campbell case illustrates its use against the press.

The Act sets out certain data protection principles (e.g. that information shall be obtained fairly, for specified and lawful purposes, shall be relevant, accurate and up to date) and gives individuals certain rights: a person is entitled to know whether, and if so what data is held about him, to have a copy of it, etc.

Above all, the Act allows an individual to require that the "data controller" cease processing any personal data in respect of which he is the subject on the ground that it is causing or is likely to cause substantial and unwarranted damage or distress to him or to another, unless the subject has given consent to the processing. Stronger rights are given in relation to "Sensitive Data" (which is information as to racial or ethnic origin, political opinions, religious or other beliefs, membership of a trade union, physical or mental health or condition, sexual life, alleged criminal activities) which may only be processed if, among other things, explicit consent has been given by the subject.

## **The Effect on the Media**

Under s.32 an exemption is given to "special purposes" material such as journalistic, literary or artistic material which is in the public interest.

Naomi Campbell successfully showed that the newspaper's use of unfairly obtained sensitive personal data could not be justified as being in the public interest, and she had not given her consent to the processing of that data.

She was awarded moderate damages after publication. Prompt pre-publication action under the Act could prove a powerful additional weapon allowing public figures to stop media investigations in their tracks.

## **HARASSMENT**

The Protection from Harassment Act 1997 was primarily intended to crack down on stalkers; but has been used against journalists.

"Harassment" is defined as a course of conduct causing alarm and distress. It can include any form of activity which annoys another person. The Act gave the court power to award injunctions and award damages; and introduced a criminal offence where the harassment gives rise to a fear of violence.

Two or more acts will constitute a course of conduct. In *Alexander Baron v Crown Prosecution Service* it was found that although the defendant had only sent the complainant two letters, in the circumstances it could be said that he had pursued a course of conduct amounting to harassment contrary to the Act. "Conduct" expressly includes speech, but can also include silence, such as silent telephone calls.

The defendant will have a defence if he can show in relation to a course of conduct that it was pursued for the purposes of detecting a crime, or in compliance with any rule of law, or involvement in intelligence activities carried out on behalf of the Crown, or that in the particular circumstances the course of conduct was reasonable. It is no defence to argue mere engagement in a lawful occupation such as that of a journalist or private detective.

### **The Effect on the Media**

Because only two acts are required to constitute a course of conduct, it is on paper possible that a reasonably diligent reporter could be on the receiving end of a harassment injunction in the normal course of preparing any story e.g. an attempted interview plus a follow-up letter could be held to be harassment.

As we reported in our Autumn 2001 Bulletin, in *Thomas v News Group Newspapers Ltd* last year the Court of Appeal upheld a decision that 3 publications and 3 letters commenting on the claimant's alleged behaviour was a course of conduct on the part of the media department capable of amounting to harassment under the Act, a decision described by many as providing a further weapon for the individual against media intrusion.

The newspaper unsuccessfully argued that the Judge failed to give sufficient weight to the right to freedom of speech and that the burden of showing that their articles were reasonable would be contrary to Article 10.

## **CONCLUSION**

It can be seen that there is currently a tension in the law. On the one hand, a number of recent pieces of legislation create potential impediments for the media in conducting journalistic enquires. On the other hand, the Judges have recently tended to stress the pre-eminence of the media's freedom of expression and made it more difficult for individuals to erode that freedom of expression. We will no doubt be reporting on further developments in this saga in future bulletins.

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This guide is for general information and interest only and should not be relied upon as providing specific legal advice. In relation to any particular matter, readers are advised to seek advice.

**further information:**

If you would like more information about any of Goodman Derrick's Media Law services please telephone and ask to speak to a member of the Media Group.

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