

The Law of Privacy



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Introduction

The protection of privacy which embodies our law of confidentiality has become increasingly important. Together with the law of defamation, privacy and confidentiality are vital rights for individuals and corporations, especially when well known figures and celebrities attract so much attention.

What is privacy?

A breach of privacy involves a misuse of private information. It has developed out of the law of confidence.

Traditional Privacy

The law has developed dramatically over the past few years to provide a remedy for the protection of privacy rights in addition to the protection of confidentiality rights such as commercial secrets. This has largely been as a result of the Human Rights Act 1998.

Traditionally, Privacy actions have been based on a breach of confidence. Breach of confidence comprises three essential requirements:

- That the information disclosed "has the necessary quality of confidence" i.e. that the information be considered private rather than public.
- The information was obtained in circumstances imposing an obligation of confidence (usually having been disclosed in confidence or in a situation where confidence is implied).
- There has been, or threatened to be, an unauthorised use of the information.

The defences to such a claim are that the publication took place with the claimant's consent, was already known to the public, or that there was a public interest in publication. An important point to remember is that not everything that interests the public will be viewed by the courts as in the public interest.

New Human Rights based Privacy

Since the Human Rights Act 1998 (which incorporated the European Convention of Human Rights into UK law) and with further development in common law there has emerged a clear new legal right to protect individual privacy.

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Article 8

Right to respect of private and family life

- "1. Everyone has the right to have respect for his private family life, his home and his correspondence
2. There shall be no interference by a public authority with the exercise of this right except in the interests of national security, public safety, or economic well-being of the country, and for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 10

Freedom of Expression

- "1. Everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

This right of free speech protects freedom of the press. There is a clear tension between the right of an individual to maintain their privacy and the freedom of the press to report the activities of



individuals. This tension has largely been resolved by recent court cases in favour of the individual's right to privacy at the expense of freedom of the press. This has led to much lobbying and debate as to whether privacy rights should be defined by Parliament.

Privacy differs from defamation in two material respects. First, privacy is not concerned with truth. It is concerned with information published which is likely to be true but which invades privacy. The public interest can provide a good defence to a claim for infringement of privacy but sometimes that is difficult to sustain.

Max Mosley the former president of the FIA, the governing body for Formula One, was exposed by the News of the World for engaging in sadomasochistic bondage sessions, but successfully argued that his private sexual activities were just that, private. He wasn't a politician in a position of power or influence and what he did behind closed doors was his affair. Mosley claimed that his Article 8 right to privacy was infringed and that there was a relationship of confidence between the participants in the S & M session.

In its defence the News of the World argued that any right to privacy was outweighed by the public interest in disclosure of the material showing Mosley engaging in S & M activity. This was based upon alleged Nazi or concentration camp role play activity or because of allegations that the activity involved the criminal offence of assault (spanking).

Having reviewed the evidence the judge found that there was no Nazi or concentration camp theme to the events in question; and therefore there was no public interest and there was no justification for the secret filming or subsequent publication. Mr Mosley won a record £60,000 pay-out for invasion of privacy.

The privacy test is twofold: (1) whether the information in question is private as laid down in Article 8; (2) if it is, does the interest of the owner of the right to privacy overcome the competing right to freedom of expression? Does he have a reasonable expectation of privacy?

The current parameters of privacy

As is apparent the law of privacy is judge made as opposed to being governed by statute law. It

centres on what is considered to amount to "a reasonable expectation of privacy" combined with the principles of confidentiality. The case brought by the model Naomi Campbell confirmed that photography is the area where particular care needs to be taken and, indeed, it is with regard to photographs that the law has primarily developed.

Photography

Photographs were taken by Mirror Group Newspapers of Naomi Campbell entering a clinic to seek drug rehabilitation. She sued successfully, not over allegations that she had a drug problem, but over a photograph that was considered to be private of her attending the clinic. Other examples include Princess Diana who started a case in privacy over photos taken of her in a gym but the case was settled out of court. Sara Cox obtained substantial damages from The Sunday People for publishing pictures of her naked on honeymoon. All of these cases have underlined the importance of the reasonable expectation of privacy. The claimants were in situations where they could expect their privacy to be respected. Anna Ford who complained to the PCC lost her complaint because she was on a public beach when photographed. It is likely that this case would be decided differently today.

That is the most significant development that has occurred is that privacy claims as they are no longer confined to what goes on behind closed doors, but now extend to what happens in a public place.

The emergence of a law of privacy in the UK was dictated by a case in Europe. Princess Caroline of Monaco sought to restrain photos of her public shopping expeditions and public activities and was successful even though her activities had been in public. This case sent shockwaves to publishers and the judgment has been further developed in this country. Today, the law of privacy for photographs applies to the following situations:-

- photographs taken by the paparazzi of a person in a private place by telephoto lens;
- photographs taken in private for private consumption; and
- photographs taken by the paparazzi in a public place in certain circumstances.

In a case brought on behalf of author JK Rowling's son, it was successfully claimed an infringement of privacy could occur in relation to photographs taken of her son in a public place. The issue of privacy in relation to children is very sensitive and the courts are more likely to protect them. Again, the establishment of a reasonable expectation of privacy is key.

Privacy claims are now very much the domain of celebrities and the children of celebrities. But there are a growing number of cases involving privacy situations - such as the wrongful publication of medical information and intrusion into grief - brought by ordinary people who complain to the PCC, or issue proceedings on a conditional fee agreement or "no win, no fee" agreement.

Other sensitive and private data

In considering the law of privacy, one must also consider the Data Protection Act 1998 and in particular, Section 2, which lists "sensitive personal data". These include the racial origin of the subject, political and religious beliefs, sexual life, health, membership of a trade union, etc. Under this Act, sensitive personal data may not be held, or disclosed, to any third party without the consent of the subject.

Examples of cases where Article 10 (the right to freedom of expression) prevails over Article 8 (the right to privacy) include those where there is a public interest defence to a claim to privacy. For example, the publication of documents from an obviously private source (e.g. government minutes) can be justified under Article 10 where they expose corruption or incompetence. The publication of photographs of an MP having a sexual dalliance in the House of Commons has been held to be in the public interest and not protected by privacy law.

In privacy, everything depends on carrying out the balancing exercise between Articles 8 and 10.

Defences

The principal defences to a claim for infringement of privacy are:

- The publication was in the public interest and the Article 10 right outweighed the Article 8 right.
- There was no reasonable expectation of privacy.
- The matter was already in the public domain.
- The matter was not “private” and did not attract the rights attached to confidential and private information.

It has been confirmed in the Courts that a claimant who invites publicity will find it more difficult to argue that his privacy must be protected. Publishers can therefore mitigate damage by highlighting the claimant’s hunger for publicity.

Injunction

With privacy, even more than defamation, stopping publication is usually essential. Once the secret is out the damage is done. Injunctions are therefore a common remedy sought from the Court to prevent publication where it is known that something private, and often contentious, is about to be published. This can lead to what is called a “super injunction” being granted which actually prevents its existence being known to the public at large.

Once something private is in the public domain, it is difficult to stop continuing publication. Max Mosley was unable to stop further publication of video footage of his private activities once they had been published by the News of the World. The injunction is therefore an important weapon but there have been well publicised attempts to misuse it, and it is an expensive remedy.

Damages

At the moment the damages for infringement of privacy are modest, and certainly not on the same scale as defamation, which is why an injunction to prevent publication is often likely to be seen by a claimant as the most effective remedy. The damages of £60,000 awarded to Max Mosley (the highest privacy award so far) were modest in comparison to the damages for libel he might have won for being alleged to have taken part in Nazi-style orgies with five prostitutes.

The law of privacy may still have an undefined place in our law developing under the umbrella of the law of confidentiality but it has rapidly become an alternative cause of action to defamation, and a popular bed fellow.

That may change. The Government have now indicated an intention to “clarify, consolidate and remove” some of the ways case law has developed especially with regard to super injunctions. It seems that some sort of codification of the law may soon be with us.

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