# The right of privacy

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For publisher and writer, the libel lawyer, showing an unwelcome interest in proving the truth, has long been the traditional last hurdle before going to print. Memoirs, diaries, biographies and even novels, where real people rub shoulders with the imagined, were subject to his red pencil. Now this censorious figure is not only exercised by what is false and defamatory, but also by what is true and private. He must be a privacy lawyer too. The change is recent.

In 1991 the actor Gordon Kaye alias Rene Artois, the café owner in *'Allo 'Allo*, was recovering from brain surgery. The *Daily Sport* decided Mr Kaye's condition and post-operative appearance were matters of overwhelming public interest and sent reporters into the hospital disguised as doctors. They secured what the paper described as a 'world exclusive' bedside photograph and interview. Mr Kaye was in no fit state to give any interview, still less his consent. The Court of Appeal regretfully declined to restrain publication of the photographs, stating that personal privacy was not a right recognised by English law.

The legal landscape was transformed seven years later by the incorporation into domestic law of the European Convention on Human Rights. Article 8 of the Convention provides that 'Everyone has the right to respect for his private and family life, his home and his correspondence'. Personal privacy was now a positive legal right enjoyed by every citizen. Naomi Campbell was to succeed where Gordon Kaye had failed.

The supermodel's complaint stretched the best judicial minds. The Court of Appeal disagreed with the Judge, and the House of Lords by a majority disagreed with the Court of Appeal. Having denied taking drugs, she accepted that her addiction could be referred to, but drew the line at the publication of details of her treatment at Narcotics Anonymous and a photograph of her leaving an NA clinic surreptitiously taken with a telephoto lens. The underlying difficulty is that privacy is not an absolute right. It has to live alongside other rights, and, in particular, the right to freedom of expression, as long recognised by the English common law and enshrined in Article 10 of the European Convention. Privacy and freedom of expression do not make easy partners. Each right necessarily restricts the other.

The criteria for privacy protection are now clear. A claimant must first show 'a reasonable expectation of privacy' in relation to the information in question. This threshold test is designed to meet the question 'is Article 8 engaged at all?' It is approached from the perspective of a reasonable person in the position of the claimant – not by what may be the more liberal standards of the prospective reader (liberal because most readers are naturally curious).

Once that hurdle is cleared, the claimant must also satisfy the Court that Article 8 should prevail over Article 10 on the facts. This issue arises in every privacy case where the threshold test is passed. Its resolution requires the Court to weigh the competing rights on the facts and to assess the degree of interference with each which the grant or refusal of relief would represent.

So much for the tests – the problem lies in their application to the particular case.

As to the threshold test, the nature of the information is the starting point. Ordinarily it is reasonable to regard information about medical conditions or treatment as private, likewise intimate information about sexual activity or inclination. Personal letters, business affairs and many family communications will often attract a reasonable expectation of privacy. Information confided by one person to another in the context of a relationship of trust is likely to satisfy the test. It is said that trivial information is not protected, but this means trivial in terms of intrusive effect rather than informational content. The photograph of Ms Campbell outside her NA clinic conveyed very little information (the clinic's location was obscure). However the publication of such surreptitious photographs was likely to deter her future attendance for fear of being photographed again.

Can information already in the public domain satisfy a reasonable expectation of privacy? The answer is generally no, if the cat is truly out of the bag. What is public cannot be kept private. However the Courts have taken a restrictive view of what is in the public domain for these purposes. The information must be generally accessible to the public not just to a section of the public. Nor will theoretical availability on an obscure website carry weight. The Courts have treated photographs as a special case. An intrusive photograph may be no less intrusive when republished. Importantly there is no principle that talking about a particular zone of one's private life opens up the whole area to unrestricted scrutiny.

The courts have not been entirely consistent about sexual activity, especially where one party to a failed relationship wishes to tell his or her story, but the other does not. It does seem that information relating to casual relationships is less likely to qualify for protection than relationships involving commitment – hence the failure of a footballer to prevent publication by a lapdancer of the details of their off-field activities. The controversial recent decision, where the Courts restrained a cuckolded husband from identifying to the public at large the parties to an adulterous affair (on admittedly unusual facts) suggests that the Courts are wary of a moral approach. In another recent case a judge injuncted the disclosure of what was rather coyly described as 'sexual activities' just inside the door of a nightclub as meriting protection since 'although the claimant may be said to be guilty of misconduct in the most general sense', it was not of such 'moral turpitude' as to deny her relief.

Much information of interest will by definition be private. Much of what influences us is private. In many cases the threshold test will be passed, and all will turn on the balancing exercise between the competing rights. This is on any view a highly subjective exercise. Its difficulty is evident from the failure of judges to agree in privacy cases, hence the roller-coaster of Naomi Campbell's ultimately successful action against the *Mirror*. When the Douglases sued *Hello!* to prevent publication of unauthorised photographs of their wedding, the Court of Appeal overruled the Judge's grant of an injunction only to disagree with itself three years later, acknowledging that an injunction should have been granted at the outset.

In weighing the Article 10 right, it is said that political speech and artistic speech weigh more than 'mere tittle-tattle'. Yet the judicial thinking has at times been confused. In the lapdancer case the Court of Appeal observed that footballers were role models for young people and such undesirable behaviour could set an unfortunate example. This may surprise the nation's youth as well as viewers of *Footballers' Wives*. One doubts that admirers of Wayne Rooney behave any better or worse on account of their hero's off-field behaviour.

The point raises deeper issues about the price to be paid for celebrity. Those who set themselves up as paragons, or brag about their sexual exploits, are likely to find their right to privacy correspondingly reduced. But suppose the celebrity derives only from a particular skill. It seems fundamentally illiberal that an individual's rights should be curtailed, merely because his or her gifts engage the public. One suspects that authors and concert pianists would be surprised to discover that they are role models as to their private behaviour. More recent cases have moved away from this rather eccentric stance and focused more on the right to correct a false image cultivated by public figures and to expose hypocrisy. In the recent McKennitt case the Court of Appeal conducted a dignified retreat from the notion of involuntary role models, stating that any expectation of higher standards of conduct was 'the preserve of head-masters and clergymen, who according to taste may be joined by politicians, senior civil servants, surgeons and journalists' – though not apparently judges or lawyers.

Even seemingly straightforward issues are complex on close analysis. It has long been said that there is no protection for iniquity. It is indeed unlikely that the Courts would restrain exposure of current drugs abuse as an infringement of privacy. Yet what of drug use long abandoned or indeed recently cured? And what of addiction, a medical condition which the House of Lords held to be in principle worthy of protection in the Campbell case, but which necessarily connotes extensive drugs use and the commission of criminal offences?

There is uncertainty as to the protection to be accorded to public figures. However even politicians, who are more accountable than others in a democratic society, are entitled to their private space. Sexual indiscretions, even health problems, though private, are likely to have reduced protection in their case. Yet the Courts may still be reluctant to permit the disclosure of unnecessary details, which the public do not need to know to assess their suitability to remain in office.

The recent case of McKennitt v Ash (where the Canadian folk singer, Loreena McKennitt, successfully prevented publication of a number of extracts of a book written about her by a former friend) makes sobering reading for authors. Its concept of what is private is wide; and its approach to what the public interest requires to justify the publication of otherwise private information hardly generous. In fairness, this strict approach reflects the trend in recent European decisions to which the English courts must have regard. Nor was the defendant helped by the fact that she was, and unashamedly claimed to be, a close confidante of Ms McKennitt who, her book conceded, guarded her privacy 'with the iron safeguard of a chastity belt' – not, it may be said, a universal approach among celebrities.

There are some comforts. The dead cannot claim. Interim injunctions in advance of trial should only be granted where the claimant's case is strong. Many will not wish to litigate once publication has taken place. Others may not object to the disclosure of private material concerning them or may be prepared to compromise. Anonymising the information will remove the risk, albeit often at the price of blandness. Damages have not to date been very substantial (at best modest five figure sums), but as elsewhere legal costs are the greater worry.

What can be said with certainty is that a modern Chips Channon would have an exasperating time with his privacy lawyer. To his outraged cry 'it's all true', the man with the red pencil would reply 'but our business or theirs?'

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