

Is there a public interest in exposing details of the private lives of celebrities?

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I think that the answer to this question is that, generally speaking, there is no real or genuine public interest in exposing details of the private lives of celebrities. If that is right, however, why does such exposure occur daily in the British media, and on such a substantial scale? Of course, the courts have no involvement with much that is made public, because the individuals concerned do not seek any relief from the courts. To that extent, there is no tension between my general proposition and what appears in the media. But what about the numerous instances in which the courts have declined to restrain publication by interim injunction, and the (albeit rarer) occasions on which they have refused to grant any relief at trial in respect of publication that has occurred? In order to answer that question, it is necessary to consider a number of different features of those areas of the law that impact on the private lives of individuals.

Logically, the first question that falls to be considered is: what constitutes part of an individual's private life in the eyes of the law? Guidance was provided by the House of Lords in *Campbell v MGN Ltd* [2004] AC 457. In that case, Lord Nicholls said: "Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy". Lord Hope said: "There must be some interest of a private nature that the claimant wishes to protect: *A v B plc* [2003] QB 195, 206, paragraph 11(vii). In some cases, as the Court of Appeal said in that case, the answer to the question whether the information is public or private will be obvious. Where it is not, the broad test is whether disclosure of the information about the individual ("A") would give substantial offence to A, assuming that A was placed in similar circumstances and was a person of ordinary sensibilities."

These words make clear that what is capable of being protected as part of an individual's private life will vary from case to case. If information has already been made public, then, with regard to that particular information, the person in question may not have "a reasonable expectation of privacy" or "some interest of a private nature to protect". This may especially be so where the initial publication was made by or with the consent of the subject of the disclosure. On the other hand, depending on factors such as its extent and the time that has elapsed since it occurred, prior disclosure may not have these consequences. If the same information has not previously been made public, but other disclosures have already been made, that may have the effect that the disclosure of

further information would not give substantial offence to the person concerned, assuming that he or she was a person of ordinary sensibilities.

In *A v B plc* [2003] QB 165, the Court of Appeal acknowledged that a public figure is entitled to a private life, but went on to say that public figures should expect and accept that their actions will be more closely scrutinised by the media, and that “Whether you have courted publicity or not you may be the legitimate subject of public attention. If you have courted public attention then you may have less ground to object to the intrusion which follows”. When the *Campbell* case was before the Court of Appeal, they pointed out that Naomi Campbell had “courted, rather than shunned, publicity” (see [2003] QB 633). The same can be said of many celebrities. It follows that the nature and extent of previous publicity about a celebrity, whose position in this regard is likely to be different from that of the average citizen, may be of importance when considering whether the claimant can satisfy the threshold test established by the House of Lords in *Campbell* with regard to specific information or classes of information, to say nothing of its importance to the exercise of the judge’s discretion at the interim stage or striking the balance at trial.

Whether or not use of particular information infringes a person’s privacy can also depend upon a wide variety of other circumstances. These include the manner in which and the purposes for which the information was obtained, how it was stored or processed, the purposes for which it is published, and the consequences of publication.

These points can be illustrated by considering the photographs in *Campbell*. In that case, the claimant conceded that, in order to set the record straight, the newspaper was entitled to publish information relating to her that would otherwise be classed as confidential. The issue was whether it was also entitled to publish, first, additional details relating to the therapy that the claimant had been undergoing for drug addiction, and, second, photographs taken in the street showing her leaving premises at which she had been attending a therapy session. The House of Lords was divided on this issue. In particular, the minority held that the photographs were not actionable because “They conveyed no private information beyond that discussed in the article” (per Lord Nicholls) and they did not amount to “the widespread publication of a photograph of someone which reveals him to be in a situation of humiliation, or severe embarrassment, even if taken in a public place ... [or] the publication of a photograph taken by intrusion into a private place (for example, by a long distance lens) ... even if there is nothing embarrassing about the picture itself” (per Lord Hoffmann). The leading majority speech was delivered

by Lord Hope. He reasoned, by reference to the judgments in *Hosking v Runtig* [2003] 2 NZLR 385, that “The taking of photographs in a public street must ... be taken to be one of the ordinary incidents of living in a free community. The real issue is whether publicising the content of the photographs would be offensive”. Lord Hope went on to say that there was a difference between a person who appears in a photograph only incidentally and a person who constitutes the true subject of the photograph and where the public nature of the place where the photograph is taken is simply used as background. He pointed out that “[although] a person who walks down a public street will inevitably be visible to any member of the public who is also present and, in the same way, to a security guard viewing the scene through closed circuit television ... [nevertheless] private life considerations may arise when any systematic or permanent record comes into existence of such material from the public domain”. Applying these factors and the reasoning in *Peck v United Kingdom* [2003] 36 EHRR 719 to the facts in *Campbell*, Lord Hope concluded that the photographs in that case constituted a gross interference with the claimant’s right to respect for her private life because they were “not just pictures of a street scene”, but were taken “deliberately, in secret and with a view to their publication in conjunction with the article” and because any person of ordinary sensibilities in the claimant’s position who “had been photographed surreptitiously outside the place where she had been receiving therapy for drug addiction, would have known what they were and would have been distressed on seeing the photographs”. Baroness Hale and Lord Carswell agreed with Lord Hope that the photographs in question were both objectionable and actionable.

Where there is some interest of a private nature that the claimant wishes to protect, such that both Article 8 and Article 10 rights are involved, a balance has to be struck between these competing rights¹. It is apparent from the decision of the House of Lords in *Re S* [2004] 3 WLR 1129 that, in striking that balance, the correct approach is that: (i) neither Article as such has precedence over the other (ii) where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary (iii) the justifications for interfering with or restricting each right must be taken into account (iv) finally, the proportionality test – or “ultimate balancing test” - must be applied to each.

As the details concerning the private lives of individuals that the mass media wish to publish are often intrusive if not positively humiliating, whereas publication of such information usually cannot claim to be of a high order of freedom of expression, it might be thought that the balance

would generally come down in favour of the individual. To explain why it may not it is necessary to have regard to a number of considerations.

First, because the relief sought in such cases will affect the Article 10 right to freedom of expression of the media (and, possibly, others – for example, in a “whistleblower” case the employee; and in a “kiss and tell” case the person who has had a relationship with the claimant), section 12 of the Human Rights Act 1998 appliesⁱⁱ. In this regard, section 12(3) is of particular significance. In *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 the House of Lords held that section 12(3) has the effect that an interim injunction may be granted in a case to which section 12 applies if the applicant can satisfy the Court that the applicant’s prospects of obtaining an injunction at trial are “sufficiently favourable”, and stated that this generally means that the applicant must establish that it is “more likely than not” that the applicant will obtain an injunction at trial, although a lesser degree of likelihood will suffice where, for example, “the potential adverse consequences of disclosure are particularly grave”. As the Court of Appeal reiterated in *Douglas v Hello Ltd* [2005] EWCA Civ 595, this means that a claimant seeking an interim injunction to restrain publication has to satisfy “a particularly high threshold test”. In *A v B plc* [2003] QB 195, for example, the Court of Appeal accepted that the claimant’s transitory and adulterous sexual relationships with two women were of a class that might be entitled to confidentiality, but held that they were “not the categories of relationships which the court should be astute to protect when the other parties to the relationships do not want them to remain confidential. Any injunction granted at trial would have to be permanent. It is most unlikely such an injunction would ever be granted”. Moreover, having decided that the freedom of the press should prevail, the court held that the form of reporting was not a matter for the court but for the Press Complaints Commission and the paper’s readers.

Second, as the Court of Appeal recognised in *A v B plc* [2003] QB 195, the refusal of an interim injunction in a privacy case may have the effect that the claimant is deprived of the only remedy which is of any value. This point is reinforced by the consideration that damages for invasion of privacy are generally modest, such that, as the Court of Appeal observed in the *Douglas* case cited above, at least in a case where the nature of the injury suffered is mental distress, they may not represent an adequate remedy. Obviously, these are matters that can properly be taken into account at the interim stage, and typically they will tell in favour of the grant of an injunction. Nevertheless, they have to be weighed against the defendant’s right of freedom of expression, which was always an important consideration and which has been enhanced by section 12. In

particular, as many stories (for example, the wedding photographs in the *Douglas* case) lose their impact and topicality if publication is restrained for even a short length of time, it may be open to the defendant to argue that the grant of an injunction would effectively dispose of the claim in favour of the claimant. I have not drawn attention to the significance of the grant or refusal of interim relief in order to debate these arguments, however, but to explain why few cases of this type are pursued beyond the interim stage, and so underline the significance of my first point.

Third, although, in general, there may be no public interest (as opposed to public curiosity) in exposing the details of the private lives of celebrities, there is a general public interest in a free press, and there may also be a specific public interest in the disclosure of information that would otherwise be subject to an obligation of confidence or properly regarded as private. Instances where there is a specific public interest in the disclosure of such information include the exposure of iniquity and the correction of a false public image (where, as was recognised in *Campbell*, the press is usually entitled to “set the record straight”). For example, although *Cream* involved a corporate claimant, the principal events in that case related to a form of wrongdoing (tax evasion) that might equally have been committed by a celebrity: the House of Lords, reversing the majority decision of the Court of Appeal, agreed with the dissenting judgment of Sedley LJ that these events were clearly matters of serious public interest such that restraint by interim injunction was inappropriate. Further, as Lord Steyn stated in *Re S*: “By section 12(4) ... Parliament made special provision regarding freedom of expression. It provides that when considering whether to grant relief which, if granted, might affect the exercise of the Convention right to freedom of expression the Court must have particular regard to the importance of that right”. Among other things, section 12(4) provides that where proceedings relate to journalistic material, the Court should have particular regard to (i) the extent to which it is, or would be, in the public interest for the material to be published and (ii) any relevant privacy code. In the case of newspapers, the relevant code is the Press Complaints Commission Code of Practice, Clause 3 of which reflects Article 8ⁱⁱⁱ. Clause 3 is one of the Clauses in that Code that is subject to a public interest exception, and that exception provides not only that there is a public interest in freedom of expression itself but also that the public interest includes “Detecting or exposing crime or a serious impropriety” and “Preventing the public from being misled by some statement or action of an individual or organisation”^{iv}. Self-regulation of other media is governed by different codes, but they are to the same substantive effect. The provisions of section 12(4) therefore go hand in glove with established common law principles concerning public interest.

Fourth, notwithstanding the views of those who argue that claimants in privacy cases should be entitled to restrain publication of material about their private lives without regard to whether it is true or false, English law traditionally draws a clear distinction between the publication or proposed publication of true information on the one hand and false information on the other. The former can be the subject of a claim for breach of confidence, whereas (assuming it is injurious to the claimant's reputation) the latter is properly the subject of a claim for defamation. This distinction is of particular importance at the interim stage due to the rule in *Bonnard v Perryman* [1891] 2 Ch 269 that, in an action for defamation, a court will not impose a prior restraint unless it is clear that no defence will succeed at trial. In *Greene v Associated Newspapers Ltd* [2005] 1 All ER 30, the Court of Appeal were prepared to accept, having regard to the decision of the European Court of Human Rights in *Radio France v France* App No 53984/00 of 30 March 2004, that the right to protection of reputation is an element of the right to respect for private life that is guaranteed by Article 8. However, they held that neither the criterion contained in section 12(3) of the Human Rights Act, nor the consideration that in accordance with section 6 of that Act it would be unlawful for the court as a public authority to act in a way which was incompatible with the claimant's Article 8 rights, had any impact on the rule in *Bonnard*, or required the court to engage in any balancing of competing rights at the interim stage. Instead, they held that "it is at the trial of a defamation action that English law shows itself appropriately solicitous of the claimant's right to a fair reputation" and that there was nothing in the European Convention on Human Rights that required the rule in *Bonnard* to be done away with. In the result, a claimant who disputes the truth of what is proposed to be published about him or her (but not one who merely contests the accuracy of details that do not affect the substance of the material in issue) will not obtain an injunction if the defendant asserts that it intends to justify the allegations or that it has any other defence to a claim for defamation - no matter, it seems, how clearly a balancing of the rights claimed on both sides might favour the claimant.

It is impossible to be comprehensive in an article of this length. Nevertheless, I hope that I have explained some of the reasons why I believe it is that, in spite of the fact that the courts have been engaged in the exercise of absorbing the rights that are recognised by Article 8 and Article 10 into the established cause of action for breach of confidence ever since the Human Rights Act 1998 came into force in October 2000, they have not interfered any more than they have to restrain the British media from continuing to provide the public with the information that it wants and enjoys receiving with regard to the private lives of celebrities.

At root, this is a reflection of the importance that our system of law has always accorded to freedom of expression, an importance which has been buttressed by the special provisions regarding freedom of expression that are contained in section 12 of the Human Rights Act 1998. But assertions that judges in particular cases have reached decisions on the basis that disclosure of the details of the private lives of celebrities is in the public interest are generally inaccurate or at best a serious over-simplification. To take a typical example, the likelihood is that the duty judge who declines to restrain publication on a Saturday afternoon of the front page story of the following day's tabloid newspaper is confronted by a case which contains one or more of the following elements: whether or not the claimant has taken the opportunity to paint himself or herself in the most favourable light, enormous publicity has already been given to many aspects of the claimant's life that would never have been published with regard to less famous individuals; in so far as it is favourable, at least some of this publicity conveys a false impression to the general public; there are elements of wrongdoing (for example, possession of controlled drugs, physical violence or other abusive behaviour, financial improprieties, deceptive work practices); and important allegations (for example, extra-marital affairs) are said by the claimant to be untrue. Faced with this situation, the judge concludes that he or she is not satisfied that the claimant is "more likely than not" to establish at trial that publication should not be allowed, and, in any event, even if there were jurisdiction to grant an injunction, it should be refused as a matter of discretion. The judge accordingly declines to grant relief on that basis. The claimant is still left with the remedies of a claim for damages or an account of profits, which may be substantial. However, these remedies are either not pursued at all or the dispute is resolved before trial, which is when a judge might well be called upon to decide whether the private interest of the claimant and the public interest in maintaining confidence or privacy on the one hand is outweighed by the general public interest in free speech or any specific public interest in disclosure on the other hand.

The histories of those cases that do go to trial suggest that it is not always straightforward to determine the extent of the public interest in exposing details of the private life of a celebrity. In *Campbell*, the claimant's victory at trial was reversed unanimously by the Court of Appeal, but was restored in the House of Lords by a 3-2 majority. In *Douglas*, the Court of Appeal refused an injunction at the interim stage, but the Court of Appeal that heard the appeal from the trial judge said that the interim decision was wrong, and the case may yet go further. These are, of course, cases in which the law is being made and clarified, but they provide an additional reason why few litigants press for a final decision on the subject.

- i The structure of Article 8, the interrelationship between Article 8 and Article 10, and the correct approach to the application of each of these rights in accordance with the jurisprudence of the European Court of Human Rights, were all summarised by Baroness Hale in *Campbell v MGN Ltd* [2004] AC 457 (at paragraph 139)
- “Each right has the same structure. Article 8(1) states that “Everyone has the right to respect for his private and family life, his home and his correspondence”. Article 10(1) states that “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...” Unlike the article 8 right, however, it is accepted in article 10(2) that the exercise of this right “carries with it duties and responsibilities”. Both rights are qualified. They may respectively be interfered with or restricted provided that three conditions are fulfilled. (a) The interference or restriction must be “in accordance with the law”; it must have a basis in national law which conforms to the Convention standards of legality. (b) It must pursue one of the legitimate aims set out in each article. Article 8(2) provides for “the protection of the rights and freedoms of others”. Article 10(2) provides for “the protection of the reputation or rights of others” and for “preventing the disclosure of information received in confidence”. The rights referred to may either be rights protected under the national law or, as in this case, other Convention rights. (c) Above all, the interference or restriction must be “necessary in a democratic society”; it must meet a “pressing social need” and be no greater than is proportionate to the legitimate aim pursued; the reasons given for it must be both “relevant” and “sufficient” for this purpose.”
- ii The relevant provisions of section 12 are:
- “(1) This section applies if the court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.”
- “(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
- “(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—(a) the extent to which—(i) the material has, or is about to, become available to the public; or (ii) it is, or would be, in the public interest for the material to be published; (b) any relevant privacy code.”
- iii Clause 3 provides:
- “3 *Privacy.
- (i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications. Editors will be expected to justify intrusions into any individual’s private life without consent.
- (ii) It is unacceptable to photograph individuals in private places without their consent.
- Note – Private places are public or private property where there is a reasonable expectation of privacy.”
- iv The Public Interest exception provides:
- “There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.
1. The public interest includes, but is not confined to:
 - (i) Detecting or exposing crime or a serious impropriety.
 - (ii) Protecting public health and safety.
 - (iii) Preventing the public from being misled by some statement or action of an individual or organisation.
 2. There is a public interest in the freedom of expression itself.
 3. Whenever the public interest is invoked, the PCC will require editors to demonstrate fully how the public interest was served.
 4. The PCC will consider the extent to which material is already in the public domain, or will become so.
 5. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interests of the child.”