HBJ Gateley Wareing

PRESS RELEASE

See No Evil, Hear No Evil, Speak No Evil – England vs. The Media and the Privacy debate

Reports in the Daily Mail and the Guardian that an "England Footballer" has obtained a "superinjunction" to restrain publication of an expose into his private life have reignited debate over the use of privacy law to restrict freedom of the press.

According to reports in both the Guardian and the Daily Mail, a member of the England Football Team obtained a so-called "Superinjunction" on Friday 14 August to prevent a leading Sunday newspaper from publishing a revealing article on his private life.

The Daily Mail in particular (and its Editor, Paul Dacre, a long-standing critic of the developing law of privacy in the UK) has been outraged by what it refers to as "the latest in a string of high-profile figures using draconian privacy laws to block the media from reporting on matters they would rather keep secret."

There are two sides to the argument – on the one hand, that celebrities are increasingly turning to the law of privacy rather than defamation to suppress negative coverage, severely limiting the freedom of the press and depriving the public of information about which they have a "right to know".

On the other, the Press are increasingly turning to stories which have nothing to do with "the public interest" to fill column inches in an environment where the Press Complaints Commission is seen as largely powerless to make any kind of real recompense once a controversial story has been run and its subject's life and career have already been seriously affected.

Over the past decade, a number of (ironically) very high-profile cases involving the so-called "right to privacy" have come before the Court. The first was Douglas v Hello!, dealing with covert photography at the wedding of Catherine Zeta-Jones and Michael Douglas (who had struck an exclusive deal with OK! Magazine for the images), and was the first hint that a "right to privacy" could exist in English law.

Next came Naomi Campbell's successful claim against the Mirror after the publication of details of her drug rehabilitation treatment and featuring Piers Morgan's immortal quote: "This is a good day for lying, drug-abusing prima donnas who want to have their cake with the media and the right to then shamelessly guzzle it with their Cristal champagne." Whilst Campbell was only ultimately awarded £3500 or so in Damages, her costs ran to over £1 million, which the Mirror was ordered to pay.

Privacy law reached its high watermark (so far) in the now-infamous battle between Max Mosley and the News of the World in 2008 over allegations of Mosley's involvement in a "Nazi Orgy" and the leaking of a video of the event online. Mosley was successful, winning damages of around £60,000 and setting out the basic "road map" to the new approach to privacy law following the coming into force of the Human Rights Act in 2000.

The Human Rights Act brought the European Convention on Human Rights into English Law and requires the Court to take its provisions into account wherever possible. In privacy cases, the Court must consider whether or not there was a "reasonable expectation of privacy" in the information in question which can be protected by the Claimant's Article 8 right to respect for private and family life (dependent in many cases upon whether or not the Claimant courted publicity) and then perform a "balancing act" with the Press' Article 10 right to freedom of expression.

The most important consideration in this balancing act is usually whether or not the information in question can be justifiably disclosed in the name of the public interest. This does not cover information which is merely "interesting to the public" and in Mosley's case Judge Eady made the point that a publication which reveals sensitive information for the sake of "titillation" or satisfying public curiosity cannot be justified. In his opinion, "the sex life of any individual is essentially their own business".

Even when freedom of expression sees the balancing act come down in the Press' favour and a disclosure can be justified as being in the public interest, (such as in cases where the disclosure is justified to expose illegal activity, to avoid the public being misled or to

contribute to a genuine public debate), this will not allow the publication of "every gory detail" and in particular, stories involving a breach of privacy of the sex lives of those in the public eye will normally be much harder to justify.

Nevertheless, the start of 2010 saw then-England Captain John Terry at the centre of the privacy law debate after obtaining a "Superinjunction" banning any reporting of his alleged extramarital affair with lingerie model Vanessa Perroncel as well as any reference to the fact that the injunction itself even existed.

The decision in Terry's case came amidst increasing criticism of what has been described as a "back door privacy law", and the "Superinjunction" was overturned after Mr. Justice Tugendhat's ruling that it was unnecessary; the information which it covered was already relatively widely known within the sport, and in his opinion, Terry applied for the injunction more to protect his commercial interests and sponsorship deals rather than his private life.

If a Claimant becomes aware of impending negative press attention and has a very strong case in either Defamation or Privacy against the publisher for which an award of damages would never truly compensate the Claimant after the fact, then an, injunction may well be the only option. They are not easy to obtain, "Superinjunctions" even less so, and are only granted in cases where allowing the publication to go ahead will cause more harm to the Claimant than restraining it would do to the Newspaper.

Even then, however, an Injunction or Superinjunction may never truly kill a story. In December last year, Tiger Woods obtained an injunction against the reporting of further intimate details of his private life being disclosed in the British press in the wake of his very public fall from grace after a number of extramarital affairs.

However, much of the information and accusations in question were already available on a number of US websites accessible from the UK, leaving many commentators wondering what the point was. In the world of real-time commentary through social media, injunctions may be very easily undermined by the information to which they relate already being in the public domain in one form or another, as Trafigura found out when dealing with allegations over the dumping of toxic waste on the Ivory Coast last year and their subsequent attempt to stifle debate on the issue in the House of Commons last year as well as the Media.

Add to this the fact Damages in privacy claims have so far been fairly limited – Mosley only received £60,000 – and the Press may believe that running a story is worth the commercial

risk against a rise in circulation, especially when the Press Complaints Commission is seen as ineffective and is unable to provide any remedy to complainants at a level anywhere near that of a Court.

However, even if that were the case, costs in privacy cases tend to be extremely high and the risk of being having to pay a Claimant's costs if successful can be enough to deter publication. As Privacy is still very much a developing area of law, it's hard to say with any certainty just what kind of reporting the Court will allow in the public interest and what will be restrained. This particular case may well help to shape the Court's future approach, but we will only have an idea of whether or not this is the case when or if the full details come out.

Practically speaking, the most obvious advice to Footballers or indeed anyone else in the public eye is to choose your friends carefully and be careful who you trust. Once a story becomes public or leaks online it is extremely difficult and costly to put the genie back in the bottle, and damage to both reputation and private life can be almost impossible to repair. It remains to be seen in this case whether or not the England Team's poor performance during the World Cup leads to a lesser degree of sympathy if the identity of the player behind this latest superinjunction becomes public.

In the social media age memories are longer and attention is more focussed. If you do need to and can take action, then do so quickly.

Photo shows Manchester-based Intellectual Property and Digital Media lawyer at HBJ Gateley Wareing, Steve Kuncewicz.

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For further information please contact HBJ Gateley Wareing Communications Manager Perry Buck on 07885 389417, email pbuck@hbj-gw.com

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