What is a SuperInjunction?

"We' ve been served an injunction on reporting that the law is an ass."

A “superinjunction” is a “a form of gagging order (i.e., an order from a judge stopping reporters from talking or writing about a case that has not yet been decided) in which the press is not even allowed to report on the existence and details of an injunction” http://www.macmillandictionary.com/open-dictionary/entries/superinjunction-also-super-injunction.htm

Macmillan further reports that 30 such superinjunctions have issued, mostly in the U.K. Super injunctions address such varied issues as water pollution, sexual affairs, and the right to die.

Similarly, *Duhaime.org (Learn the Law)* defines a “superinjunction” as an “injunction obtained in a secret convening of the court where in the result, the court file, the names of the parties and even the terms of the injunction order are secret except as between the parties, counsel, the judge and the court staff.” *See* www.duhaime.org

According to http://meejalaw.com/super-injunctions the term, superinjunction, came into existence in 2009 after a major media outlet reported jokingly that an injunction coupled with the court’s contempt powers was a “class-action” injunction. meejalaw.com, a media law and ethics site, includes a very useful chart of privacy injunctions from 2010-2012, all from courts in the U.K. Anyone wishing to review the decisions on superinjunctions would do well to start with Townend’s chart at www.meejalaw.com .

An example of a Super Injunction …

One order in Townend’s chart addresses a potential blackmail situation regarding exposure of a private affair. http://www.bailii.org/ew/cases/EWHC/QB/2010/2335.html The court acknowledged that the alleged blackmailer might avoid service of a conventional injunction order, therefore, the court took the additional step of ordering, “The order also provided that there should be no report of the existence of the proceedings themselves. I considered that provision in particular to be necessary for a short period because of the ‘tipping off’ risk to which I have referred.” In this order, the court also noted that a number of media organizations were also served with the order. Who is responsible for serving the media? The Court, the litigants? How would they know if they had served all necessary media?

This decision involved a so-called superinjunction or privacy injunction issued under authority of CPR 39.2(3). http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part39 U S. court rules also provide for protection of disclosure of litigant’s information. *See e.g.,* Fed. R. Civ. P. Rule 5.2. Therefore, while superinjunctions seem to be more of a U.K. and E.U. phenomenon, presumably information put before a U.S. state or federal court might also result in an order enjoining disclosure of the subject matter of the order enforceable by the court’s contempt powers.

Are super Injunction orders enforceable?

The confusing “super-injunction supernova” as referred to by Adam Wagner in ”The super-injunction toolkit” at http://ukhumanrightsblog.com/2011/05/10/a-super-injunction-toolkit references several blogs that discus s the problem of tweets regarding the existence of

superinjunctions. Imagine someone in the U.K. reads a s0-called superinjunction and then calls a friend in the U.S. or elsewhere who then tweets the information with appropriate #hashtags such that the secret news is quickly trending on Twitter. Would the U.S. citizen be subject to contempt under a U.K. order not to disclose terms of a so-called superinjunction? Superinjunctions and social media pose a similar problem as jurors in trials who can readily disobey a judge's instructions to consider only the evidence presented at trial, using their smart phones, iPads, laptops, or even home computers.

David Allen Green in "Thinking clearly about superinjunctions" at http://www.newstatesman.com/blogs/david-allen-green/2011/05/superinjunctions-media-court describes the background of superinjunctions as follows:

The background to all this is that the word "superinjunction" now has a special and exciting quality. This is strange as, in one important way, "superinjunctions" do not really exist. What the High Court can offer are injunctions: court orders directed at parties so as to prevent certain specified courses of action. A "superinjunction" is just a normal injunction but with strict terms, and it is not an entirely new legal creature. Strict injunctions are as old as the equitable jurisdiction of the High Court.

Green's work suggests superinjunctions are necessary to protect legitimate rights, namely "confidentiality, legal professional privilege, [and] private information." Superinjunctions, however, are counter to the conventional wisdom that the courts are open to the public. So, do American citizens have less rights of privacy and confidentiality than U.K. citizens as a result of the First Amendment prohibition against prior restraints?

How is a Super Injunction Different?

A superinjunction is a form of prohibitory injunction coupled with the court's contempt powers providing that anyone that reads the order is also, presumably, put on notice of being subject to contempt for improper disclosure of even the existence of the court order.

So is the "superinjunction" just a derogatory term created by paparazzi wishing to be free of restrictions on reporting on the private lives of litigants in domestic or otherwise private affairs?

Super Injunctions in the U.S.?

In http://www.bbc.co.uk/news/world-us-canada-13338757 Tom Geoghegan of the BBC addresses the issue of why superinjunctions do not occur in the U.S., and attributes the reason to greater media rights in the U.S., specifically the Constitutional prohibition against "prior restraints" provided in the First Amendment.

Geoghegan notes the well known *Pentagon Papers* case from 1971 is one example of a prior restraint in the U.S. In the U.S., national security would be one rationale, perhaps the only one, for what is now known in the U.K. and abroad as a superinjunction.

What is required to obtain a *so-called* superinjunction?

In the example case referenced above from Townend's meejalaw.com, the court summarized the relevant principles of so-called "superinjunctions" as follows:

Interim relief before trial. *Since this is an application which, if granted, might affect the exercise of the right to freedom of expression, section 12 of the Human Rights Act 1998 applies and no 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.*

"As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial." See Cream Holdings Ltd v Banerjee [2005] 1 AC 253, at [22] per Lord Nicholls.

Private information. *When considering whether the publication of information which is said to be private should be permitted, the court must first decide whether the information in question is private, that is whether the claimant has a reasonable expectation of privacy in respect of that information such that the claimant's rights under Article 8 of the European Convention on Human Rights are engaged (stage 1). If yes, the Court must then engage in a balancing exercise, weighing the Article 8 rights of the claimant against the Article 10 rights of the defendant (stage 2). See e.g. Murray v Express Newspapers Plc [2009] Ch 481at [24], [27], [35] and [40].*

In Murray the Court of Appeal said at [35] that the question at stage 1 is "a broad one" which "takes account of all the circumstances of the case". The Court of Appeal also quoted with approval Lord Hope's formulation of the test in Campbell v MGN [2004] 2 AC 457, [99]:

"The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the Claimant and faced the same publicity"

Relevant considerations include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent, whether it was known or could be inferred that consent was absent and the effect (of disclosure) on the claimant (see Murray at [36]).

The Court should approach the balancing exercise at stage 2 in this way:

"First, neither article has as such precedence over the other. Secondly, 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. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each"

per Lord Steyn in Re S (a child) [2005] 1 AC 593 at [17].

Public Interest. *It is not enough for information to be interesting to the public. Publication of the information must be in the public interest. The modern approach in any event is to consider*

public interest as an aspect of proportionality: see HRH Prince of Wales v Associated Newspapers Ltd [2008] Ch 57 at [68].

The court in the case above held the blackmail allegation met the public interest requirement.

Also missing from these superinjunction orders is a requirement that the applicant post a bond. *See e.g.,* Fed. R. Civ. P. 65(c).

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