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Should people in the public eye have a right to privacy?

“A celebrity is a person who works hard all his life to become well known, then wears dark glasses to avoid being recognised”¹

Privacy is a precious commodity for the famous. The principal ways of protecting this privacy used to involve tinted windows and burly security men. However, now there is something extra celebrities can use – the law.

The classic judicial retort would be that “there is no law of privacy”.² However, the Human Rights Act 1998 has sparked a two-pronged revolution in this area to the point that the law now recognises challenges to invasions of privacy. The first prong is Article 8 (the right to privacy), the second prong is that this right can be used in disputes involving private parties.³ The full implications of this 'indirect horizontal effect' have yet to be seen.⁴

The House of Lords enshrined this revolution in *Campbell*⁵ where it developed the old 'breach of confidence' tort to protect information of which a claimant would have “a reasonable expectation of privacy”.⁶ The barrier to this being a *general* right of privacy was that there was “no privacy in popping out for a pint of milk”⁷ but it was held recently that the law *could* also protect mundane and routine acts too.⁸ The use of an old idea in a new context has *effectively* created a general right to privacy.⁹

¹ Fred Allen, *Treadmill to Oblivion*

² See LJ Buxton in *Wainwright v Home Office* [2002] Q.B. 1334 at [105]

³ s6(3)(a) Human Rights Act 1998

⁴ See Baroness Hale in *Campbell v Mirror Group Newspapers* [2004] UKHL 22 at [132]

⁵ *Campbell v Mirror Group Newspapers* [2004] UKHL 22

⁶ Lord Nicholls of Birkenhead in *Campbell v Mirror Group Newspapers* [2004] UKHL 22 at [22 - 25]

⁷ Macmillan, K., *Case Comment: Baby Steps*, in *Communication Law*, 2008, p74

⁸ See Sir Anthony Clarke M.R. in *Murray v Express Newspapers Plc* [2008] EWCA Civ 446 at [59 - 60]

⁹ McLean and Mackey, *Is there a law of privacy in the UK? A consideration of recent legal developments* in *European Intellectual Property Review*, 2007, p395

So, if this general right of privacy exists, surely those in the public eye should benefit? After all, celebrities are people too. Lord Bingham stated that the rule of law requires “that the laws of the land should apply equally to all, save to the extent that *objective* differences justify differentiation”.¹⁰ Can we really talk of fame as an objective difference? Horace Greeley got it right when he said that “fame is a vapour, popularity an accident”.¹¹ The famous have their status because of the public interest which is driven by editorial judgements of what editors *think* interests the public. This aspect of the media has always been curiously circular.

However, Paul Dacre¹² argues for this editor-knows-best approach to human rights. There are, in his opinion, those who do not deserve human rights. The fact that Article 8 applies to “everyone”¹³ encourages amoral law which allows “the corrupt and crooked to sleep easily in their beds”.¹⁴ For Dacre, Max Mosely is a prime example of a famous person breaking “public standards of morality”¹⁵ and then the newspapers being unfairly slapped for publishing the story.

The problem with Dacre's argument is that it fails to see that Mosley is famous *because* the media have chosen him to be famous. That is how fame works. It is a decidedly non-objective process. This is why fame alone cannot qualify a general right to privacy for it would subvert the rule of law.

However, Article 8 can be qualified if there is a *public interest* in publication. The public interest “depends on the circumstances”¹⁶ but one thing is clear: it does not mean what the public

¹⁰ Lord Bingham of Cornhill, *The Rule of Law* (speech given at the Cambridge Centre of Public Law on Thursday 16th November 2006 – see http://cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php)

¹¹ Attrib.

¹² Editor-in-chief of The Daily Mail

¹³ Article 8, Human Rights Act 1998

¹⁴ Dacre, Speech to The Society of Editors on Sunday 9th November – for the full transcript see: <http://www.mailonsunday.co.uk/news/article-1084453/Paul-Dacres-speech-full.html>

¹⁵ Ibid

¹⁶ See *Murray v Express Newspapers Plc* [2008] EWCA Civ 446 at [H8]

are interested in.¹⁷ Nor does it necessarily mean the newspapers' interests.¹⁸ Dacre must be annoyed.

In the case of celebrities we can add another – there is no public interest in knowing the details of a celebrities everyday life. We can say quite confidently that there is no public interest in publishing the shopping routines of ordinary members of the public. This should be no different for a celebrities. Fame alone does not create a public interest in what would be otherwise private information.¹⁹

Determining 'the public interest' is not particularly straight-forward. There are some established examples of when the public interest justifies publication: disclosure of legal wrongdoing²⁰, if there is some beneficial purpose to the community²¹ or correcting the record.²² These are reflected in section 3 of the Press Complaints Commission's Code ('the PCC Code') – a code guarded by Paul Dacre himself.²³

Crucially, however, the assessment depends on the facts of each case. But, there are two useful principles given by Baroness Hale in *Campbell* which can flesh out the rather loose-sounding 'balancing exercise' which the courts undertake to help decide what amounts to the public interest.

Firstly, Hale referred to the ubiquitous test of 'proportionality' which asks whether limiting a right is legitimate in its aim, necessary in a democratic society and proportionate in its exercise.²⁴ Secondly, and more interestingly, Hale considered a hierarchy of different kinds of 'speech' – political speech being the most important which is followed by intellectual, artistic and educational

¹⁷ See Baroness Hale in *Jameel (Mohammed) and another v Wall Street Journal Europe Sprl* [2006] UKHL 44 at [147] and Buxton LJ in *McKennitt v Ash* [2006] EWCA Civ 1714 at [66]

¹⁸ See Sir John Donaldson M.R. in *Francome v Mirror Group Newspapers Ltd* [1984] 1 W.L.R. 892 at [898]

¹⁹ See Lord Hoffmann in *Campbell v Mirror Group Newspapers* [2004] UKHL 22 at [57]

²⁰ *Istil Group v Zahoor* [2003] 2 All ER 252

²¹ *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033

²² *Campbell v Mirror Group Newspapers* [2004] UKHL 22

²³ See: <http://www.pcc.org.uk/about/whoswho/committee.html>

²⁴ See Baroness Hale in *Campbell v Mirror Group Newspapers* [2004] UKHL 22 at [140]

speech.²⁵ Accordingly, long-lens photos of fornicating celebrities could satisfy the public interest test if they furthered political debate. It would certainly be an interesting submission to make.

Bearing these principles in mind, we might be able to help clarify 'the public interest' by suggesting the following amendment to s3 of the PCC Code:

“the public interest is not served through the disproportionate publication of confidential, private or intimate information that cannot be shown to promote political, intellectual, artistic or educational freedom of expression”

Defining what the public interest is *not* is useful – it tells editors what to avoid. The courts are bound to give regard to “any relevant privacy code”²⁶ when performing their balancing exercise which gives the Code a quasi-legal status. A Private Members' Bill²⁷ has also been introduced to put breaches of the PCC Code on a firmer statutory footing – this would give an important bite to a voluntary scheme that is consistently ignored by editors in favour of the latest paper-selling wheeze.

Pascal captured something when he said, “the charm of fame is so great that we like every object to which it is attached”.²⁸ For a right to privacy to mean anything the ultimate test is whether even those that choose to flaunt their lives in the public-eye can be assured that the small aspect of their lives which is private remains private. In support of such a right is the rule of law and the public interest. Against such a right is Paul Dacre. Thankfully, we are compelled to follow the former.

Word Count: 1000

²⁵ Ibid at [148]

²⁶ Section 12(4)(b) Human Rights Act 1998

²⁷ Introduced by Jim Sheridan. To check progress see: <http://services.parliament.uk/bills/2007-08/presscomplaintscommissionbreachesofcodeofpractice.html>

²⁸ Pascal, *Pensées*