

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

Pity our poor judges. As unfashionable as that sentiment sounds, when it comes to the issue of privacy, our much-maligned judiciary is faced with a very public dilemma. The headache of trying to reconcile the European Convention on Human Rights with existing English strictures, combined with the trend for high-profile “exposures” in the media, has again turned the spotlight on our arbiters of justice and reignited demands for a unified privacy law. But should those in the public eye have a right to privacy? And, as editors fret over freedom of expression, must we ask ourselves: what price privacy?

Article 8 of the Convention provides the right to respect of one’s private and family life, and Article 10 the right to freedom of expression. These rights are imported into national law through the Human Rights Act 1998 and, privacy legislation lacking, are ‘shoehorned’ chiefly into the tort of breach of confidence. In balancing these often conflicting rights, the court examines whether an expectation of privacy arises, and if so, whether public interest in the matter overrides it.

However, the threshold for finding public interest has been raised by the recent case involving Max Mosley, head of FIA Formula 1 and son of the former fascist leader, Sir Oswald Mosley. One might have expected that news of such a powerful public figure engaging in sadomasochism with five prostitutes in a torture chamber was of public interest, Nazism or not. But Mr Justice Eady stressed that judges should not “make individual moral judgments or...be swayed by personal distaste”,¹ neither of which equate to public interest. That defence normally applies to deeper concerns such as stories exposing crime or misdemeanour, especially by officials, or relating to use of public money.

¹ Mosley v News Group Newspapers Ltd [2008] EMLR 20

So outraged, however, was Daily Mail editor, Paul Dacre, at Mr Justice Eady's "arrogant and amoral" judgment, that four QCs felt compelled to defend the judge,² claiming that rather than trying to form a back-door privacy law, he had simply followed precedent. Arguably, though, the decision to fine the News of the World £60,000 will seriously hinder future undercover investigations of other powerful individuals whose extra-curricular activities may raise questions about their overall integrity.

The press is not as cavalier about privacy as opponents complain. The Editors' Code of Conduct, enforced by the Press Complaints Commission – a self-regulatory body – is sensitive to privacy rights. But there exists also the reasonable principle that "privacy is not a commodity which can be sold on one person's terms".³ If someone details their private life on TV and in newspapers, they encourage future media interest. Deception of the public is also relevant. Because Naomi Campbell told the Mirror she did not take drugs, reports of her receiving treatment were justified (though precise details were not). Effectively, a celebrity must handle Article 8 carefully to rely on it later. J K Rowling's success in suing The Sunday Express Magazine over published pictures of her son owed much to her earlier attempts to protect her family's privacy.

What about photographs? In 2004, the European Court of Human Rights essentially banned any pictures of Princess Caroline of Monaco that were unrelated to her public duties. Lord Justice Buxton remarked that there is "little doubt that Von Hannover extends the reach of Article 8 beyond what had previously been understood".⁴ Can journalists no longer take unauthorised snaps of celebrities in public?

The answer depends on two factors: manner and place. As recently seen with actress Sienna Miller, anti-harassment legislation originally relating to animal rights protesters may now, it seems, be used against paparazzi. But surely respectable, limited photography, where a celebrity is in a public, open

² 'QCs defend Mr Justice Eady as newspapers accuse him of privacy rulings', Times Online, November 11th 2008

³ Features in the Editors' Codebook, which can be viewed here: <http://www.british-companies.co.uk/downloads/codebook/part4.pdf#search=%22terms%22>

⁴ McKennitt v Ash [2007] 3 WLR 194

space such as a park, is justifiable. Indeed “there is a public interest in freedom of expression itself”.⁵ From a practical perspective, imagine the flood of costly litigation and ensuing compensation culture that ‘unauthorised’ pictures could prompt.

The court’s struggle to define coherent principles has produced a mixed bag of ambiguous rights, but this is preferable to a privacy law. No legislation could strike a universally applicable balance between Article 8 and 10. Judges would have to interpret legislation to produce a fair outcome on the facts, but reading into it too liberally would lead inevitably to allegations of subjectivity. Another pitfall is that public officials might seek to hide any misconduct by resorting to privacy legislation. Press freedom, a hallmark of our democracy, could be severely hampered.

The solution lies in strengthening the Code of Conduct and the Press Complaints Commission, each considered by the Culture, Media and Sport Committee in its 2007 inquiry.⁶ Recommendations included making the Code a contractual requirement for journalists and third parties (a PCC proposition arising from reporter Clive Goodman’s illegal interception of Royal voicemail). The National Union of Journalists proposed a conscience clause allowing journalists to disobey any inappropriate instructions.

The PCC is often far more effective than perceived. It is flexible and responds to changing public sentiment far better than privacy legislation could. But there is room for improvement. The Commission should take more preventative measures. It need not wait for an official complaint before ordering a ‘desist notice’, protecting a subject who feels harassed (advice arising from the intrusive coverage of Kate Middleton). Editors should also refuse pictures obtained through harassment. More prominent publication of resolutions would encourage editors to be more vigilant and boost public confidence in the PCC. New powers to issue fines might also encourage vigilance.

⁵The Editors’ Code of Conduct: can be viewed at <http://www.pcc.org.uk/cop/practice.html>

⁶ Can be viewed at <http://www.parliament.the-stationery-office.co.uk/pa/cm200607/cmselect/cmcomeds/375/37502.htm>

Public figures, whether politicians, celebrities or captains of industry, must expect greater scrutiny by virtue of the very nature of their occupations. We, as the public, expect the media to behave responsibly. But we also need to know when influential figures are acting inappropriately. A privacy law, though administratively tidier, could deny us that safeguard – and that is too high a price to pay.

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