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PRIVACY, PARLIAMENT & the JUDICIARY (the privacy ping pong)

By Sam Makkan – Barrister and author: "The Human Rights Act 1998 – The Essentials" published by Callow.

This article argues that there is consensus as to the desirability of a privacy law amongst judges and parliament. Each is throwing the privacy ball into the other's court hoping that the other will develop it. But the recent judgment in the case of Michael Douglas illustrates that our judges are poised to recognize a law of privacy and has left the way open for our courts to develop a privacy law where deserving individuals are left without protection.

Introduction

Nearly 5 years on and a number of cases since the Human Right Act 1998 (the Act) there has been much debate and disappointment that the citizens of the UK are still waiting for the much expected right to privacy under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Judges

Gordon Kaye, the actor, was in hospital recovering from serious head injuries. A reporter and photographer invaded the hospital room and took photographs of Mr. Kaye. In 1991 in the case of Kaye v Robertson, Times 21 March 1990, (1991) FSR 62 Glidewell LJ in the Court of Appeal said:

"It is well known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals".

Lord Justice Bingham agreeing said:

"The case highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens".

Leggatt LJ in the same case recognizing a need for privacy law said:

" The right has been so long disregarded here that it can be recognized only by parliament".

Historically other senior judges have underlined the importance of the right to privacy – *Morris v Beardmore (1981) AC 446 p 464C, Schering Chemicals v Falkman (1982) QB 1 p 21C, Attorney-General v Guardian Newspaper Ltd (No2) (1990) QB 109 p 255, R v Khan (1997) AC 558 p 571A-D and p582G – 583A.*

Parliament

In the past, reports of the Law Commission (Breach of Confidence 1981, Law Com No 110 and 1998 Law Com No 258) indicate how successive governments and parliaments have been content to leave the development of the law in this field to judges.

Should the courts develop a right to privacy? In answering this question the Lord Chancellor, Lord Irvine of Lairg, pioneering the Human Rights Bill through Parliament said in the House of Lords, Committee Stage (Hansard HL, 24 November 1997, col. 784)

"… I have often said, the judges are pen-poised regardless of incorporation of the convention to develop a right to privacy to be protected by the common law. This is not me saying so; they have said so. It must be emphasized that the judges are free to develop the common law in their own independent judicial sphere. What I say positively is that it will be a better law if the judges develop it after incorporation because they will have regard to arts 8 and 10, giving art.10 its due high value…"

and

"I believe that the true view is that the courts will be able to adapt and develop the common law by relying on existing domestic principles in the laws of trespass, nuisance, copyright, confidence and the like to fashion a common law right to privacy… I repeat my view that any privacy law developed by the judges will be a better law after incorporation of the convention because the judges will have to balance and have regard to arts 10 and 8, giving art.10 its due high value".

The challenge

The legal landscape, however, has changed. The requirement in s 2 of the Human Rights Act 1998 (HRA) to take into account human rights jurisprudence and the obligations under article 8 itself has raised expectations that a law of privacy will develop under the common law. The HRA is designed for precisely the measured and considered advancement to a law of privacy.

That challenge to develop a "better law" of privacy has come and gone several times. In order that judges develop the common law of privacy and to balance it against article 10, undoubtedly to be given its high value, there has to be recognition of article 8 privacy. Without the right being recognized there cannot be a balancing exercise as between article 8.2 itself let alone article 10.

In *(1) Michael Douglas (2) Catherine Zeta-Jones (3) Northern & Shell PLC v Hello! LTD (2001) 2 WLR 992* Sedley LJ, in the court of Appeal but at the interlocutory stage, in a most persuasive judgment held that English law recognized the right to privacy in accordance with article 8 of the European Convention on Human Rights, but that there were degrees of privacy to be balanced against articles 8(2) and 10. The claimants had a powerful prima facie claim to a remedy for invasion of their privacy as a qualified right recognized and protected by English law. He said:

"…The courts have done what they can, using such legal tools as were to hand, to stop the more outrageous invasions of individuals' privacy; but they have felt unable to articulate their measures as a discrete principle of law. ***Nevertheless, we have reached a point at which it can be said with confidence that the law recognises and will protect a right of personal privacy".*** [Emphasis added]

Keene LJ in the same proceedings recognising developments in the law said:

"…there would seem to be merit in recognising that the original concept of the breach of confidence has in this particular category of cases now developed into something different from the commercial and employment relationships with which confidentiality is mainly concerned".

Given the parliamentary and judicial will for a privacy law one would have expected to have seen a development towards recognising that law in *(1) Michael Douglas (2) Catherine Zeta-Jones (3) Northern & Shell PLC v (1) Hello! LTD (2) Hola SA (3) Eduardo Sanchez Junco (4) Marquesa De Varela (5) Neneta Overseas LTD (6) Philip Ramey (2003) EWHC 786 (Ch).* Instead, Lindsay J at the full and merits hearing of the case in the High Court held that the claimants' wedding was protected under the law of commercial confidence as a valuable trade asset. Publication by the rival magazine

was a breach of that confidence. The judge declined to hold that there was a law of privacy under which a remedy lay. Referring to Sedley LJ's judgment he said:

"I am invited to hold that there is an existing law of privacy under which the claimants are entitled to relief. ***I decline that invitation…"*** [Emphasis added]

He went on to acknowledge the merits of the arguments in favour of privacy but did not see a need for the creation of a new law in areas in which claimants had adequate protection and enforcement available under the law of confidence. The law of confidence protected Mr and Mrs Douglas and relief was available under that law. In the case itself he saw no existing holes in English law to be filled with reference to our obligation under the Convention.

The thrust of his position is that where the law of confidence provides no or inadequate protection to those deserving of protection it may well be that the courts will have to step in to provide a remedy. He said:

"…this case now before me is not such a case and there is therefore no need for me to attempt to construct a law of privacy and, that being so, it would be wrong of me to attempt to do so".

The way for judges, therefore, to develop and construct a law of privacy has been left open. Further development by the court may merely be awaiting the first post HRA case where English law does not protect the deserving individual. This individual may well be the claimant in the position of Gordon Kaye. Another deserving individual may be the claimant in the case of *Peck v United Kingdom* – judgment given by the Strasbourg court on 23 January 2003. Indeed, Keene LJ in the interlocutory proceedings mentioned above said that given the developments in the law of confidence and the obligation on English law now to take into account the right to respect for private life under article 8 when interpreting the common law it is likely that Kaye v Robertson, which held that there was no actionable right to privacy in English law, would be decided in a different way.

Conclusion

This is not to say that there will be an open season for "privacy claimants". It may well be that a fully developed law of privacy (the so called "blockbuster tort") would be an equitable remedy. The new landscape will not change the equitable maxim "he who comes to equity must come with clean hands" and will not protect those who have themselves acted unconscionably. The bounty of the court of equity is unlikely to be available to "unattractive suitors" – Brooke LJ in the interlocutory proceedings. In *Naomi Campbell v Mirror Group Newspaper LTD (2003) 2 WLR 80* the Court of Appeal held that where a public figure chose to make untrue pronouncements about his or her life the press would normally be entitled to put the record straight – see also *Jean F Jones v University of Warwick, Times Law Reports 7 February 2003* in which the claimant, it was said, was attempting to deceive and mislead the defendants in a personal injury claim, the insurance company having obtained video evidence surreptitiously.

What the law of privacy will do is it will recognize the fact that the law has to protect not only those with employment and commercial relationships which have been abused but those who find themselves subjected to unwarranted intrusion into their personal lives, recognizing the inclusive nature of human rights. The new landscape should not create tenuous or artificial relationships of confidentiality between citizen and invader. The law can recognize a right to privacy as a legal principle drawn from the fundamental value of personal autonomy. Let us have a right of the individual to be let alone as a freestanding right irrespective of commercial, employment or other propriety interests to be balanced

against articles 8(2) and 10. Lindsay J has left open the privacy door for judges to push on to give relief to deserving claimants in the absence of lucrative confidentiality relationships.

On the 18th May the court of appeal delivered its judgment in the case of Hello! Magazine, [2005] EWCA Civ. 595. The judgment recognizes that there is a Convention obligation on member states to protect individuals from unjustified invasion of private life and an obligation on national courts to interpret national legislation in a way which will achieve that result. This requirement on member states was reiterated by the ECtHR in von Hannover v Germany (24 June 2004) in which Princess Caroline of Monaco complained against a series of German courts for not protecting her privacy rights. The complaints related to press photographs of her that had been taken in public.

Having recognized this position, the Court of Appeal concluded that they were required to adopt the remedy of breach of confidence as a cause of action. It went on to hold that the court should, insofar as it can, develop the action for breach of confidence in such a manner as will give effect to both articles 8 and 10. In that exercise the court should take account of Strasbourg jurisprudence. The court of appeal went on to say:

"We cannot pretend that we find it satisfactory to be required to shoe-horn within the cause of action of breach of confidence claims for publication of unauthorized photographs of a private occasion".

The Court of Appeal appears to have been uncomfortable with having to stay with breach of confidence. The Hello! Case is likely to go to the House of Lords. It will be interesting to see whether that court will take forward and develop further the blurring distinction between confidence and privacy. The House of Lords has begun this process in its judgment in the Naomi Campbell case. It will also be interesting to see to what extent the recent ECtHR pronouncements in the case of von Hannover are taken into account in conjunction with parliamentary intention. Is the House of Lords going to resist the momentum set by parliament, judges themselves and the ECtHR?

For the continuing use of the term "duty of confidence" and describing private information and photographs as "confidential" is not appropriate. An individual's private life would not, in ordinary language, be termed "confidential". The more natural description today, and one which members of the public would understand, is that such information is "private".