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Towards the apocalypse

■ Heather Brooke ■ Trevor Kavanagh ■ Emma Soames

Is Max Mosley right on privacy?

Amber Melville-Brown

The injunction – not necessarily of the super kind – is an essential tool if the right to privacy is to be protected, argues a media lawyer

All journalists know what an injunction is: a chill wind on free speech; a legal edifice behind which the guilty and indiscreet can hide. Alternatively, it is an essential break against the wilder excesses of Fleet Street, and the only worthwhile remedy to the party seeking to prevent the unjustified exposure of his or her private information. Such is the weight given to free speech in this country that courts will generally not step in to prevent a publication before it has seen the light of day. Rather, the prospect of defamation litigation is a sage reminder that judgment day is around the corner. Publish now, it warns, but be damned later in damages if you fail to substantiate a defence.

But privacy is different – and this is where the injunction comes into its own. The courts consider that while a reputation damaged by a false and defamatory allegation may be rectified by a verdict or judgment and payment of damages, the same cannot be said of private material. Once the confidential kitten is out of the bag, she cannot be stuffed back in. To maintain the status quo until the competing rights can be balanced in a substantive hearing, the court may grant an injunction to prevent publication.

The well-established principles on an injunction application include that neither Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private and family life, nor Article 10, which guarantees the right to free speech, has precedence over the other. Where they are in conflict the court focuses intensely on the facts,

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considering the respective justifications for interfering with each right. Then an ultimate balancing test is applied. This is precisely what the applicant wants – to have the chance to argue, before publication, that the information is private and that publication cannot be justified. The respondent, on the other hand, wants anything other than the journalistic juggernaut to be slowed or even stopped. By the time the matter gets to court the news agenda may have moved on and any scoop may have lost all currency.

The debate on media law in England and Wales has become distinctly polarised with many frothing mouths at the far reaches of the debate. Indeed, the media have been shouting loudly of late about "draconian libel laws" and the chilling of free speech through no-win, no-fee agreements (Conditional Fee Agreements/CFAs). These voices have been heard, with Lord Lester of Herne Hill framing his defamation bill last year, the Government jumping on board and proposing to institute a Defamation Act in 2012, and Lord Justice Jackson coming down like a ton of bricks on recovery of success fees in CFA cases in his review of civil litigation costs.

Negative impact on free speech

But while lawyers on the defendant team may pride themselves on tilting the playing field ever more in their favour regarding defamation, they fear that the ball is rolling the other way in relation to privacy. Leading the charge is the former president of the Federation Internationale de l'Automobile, Max Mosley, who argues that the injunction is the only remedy of value in a privacy action and that by failing to ensure that claimants are notified of potential privacy infringements in advance, they are deprived this remedy, making UK law non-complaint with the EU Convention.

The potential negative impact on free speech by an injunction was not ignored by legislators when the Human Rights Act 1998 (HRA) was implemented. The act incorporated the Convention and its warring factions of Articles 8 and 10 into English law. Section 12 of the HRA was specifically included as protection for the media, applying if a court "is considering whether to grant any relief which, if granted, might affect the exercise of the convention right of freedom of expression". An injunction against publication is clearly such relief, and it should not be ordered "unless the court is satisfied that the applicant is likely to establish that publication should not be allowed". "Likely", the courts have established, means more likely than not – a more than 50 per cent chance of success.

Those on the inky-fingered side of the debate have argued that the injunction has given many – mainly wealthy celebrities – too much leeway in preventing publications before they get safely to bed. But while an injunction can not only delay but kill a story, if you listen carefully through the clamour of chest-beating and harrumphing, there is a quiet voice of reason that says perhaps this is fair and just. Having worked as a media lawyer on both sides of the claimant/defendant divide – now as a full-time claimant lawyer – I invite you to try on the shoes of the privacy claimant, if only for 2,000 or so words, and I ask you this: when was the last time you had sex? Where did you do it, under the bedclothes or swinging from the light fittings? Who was your partner (or partners)? What positions did you use? Which positions couldn't you manage? Sorry, I didn't quite hear that...

Our tradition of a free press allows the media to respond to popular culture. At present, it is mainly footballers and pop stars that are the public's celebrities of choice. But imagine that the newspaper-reading public came over all Marilyn Monroe in her Arthur Miller days and preferred something a little more cerebral. Culture dictates celebrity, and in a few years time, what we really want to learn about might be Alan Rusbridger's (fictional) shoe fetish, the (fictional) cellulite problem of a news reporter at the *Mail on Sunday* or the sexual proclivities of a producer of Radio Four's *Today* programme. Would the injunction seem a little more palatable to those in the media if it were the privacy of their representatives that was being invaded?

The truth is we all have private lives to protect. The fact that some of us may be well known within our sectors does not mean that our private information should be fodder to feed the public's hunger for gossip and titillation. Only if there is a genuine public interest in revealing private information should it be exposed. And where there is none, the subject should have access to a legal device to prevent publication. The media are much better placed to be able to substantiate a public interest justification in favour of publication than is the unknowing subject of the article able to prevent it. The latter, as the law currently stands, is unlikely to be aware that his privates are about to be splashed across the front page of a national newspaper.

The public interest defence in defamation actions enables journalists to defend an allegation that might actually be untrue on the grounds that its publication was in the public interest and was published responsibly. In demonstrating the degree of responsibility exercised, the defendant will usually attempt to show the court that he took all reasonable steps to

investigate the story, including putting the allegations to the subject and reporting a response, if any, in the article. But the same is not done as a matter of course in cases where the publication is likely to engage the subject's Article 8 rights. Why the different standards? Because of the injunction – if the subject gets wind of the proposed publication and has an ounce of sense and few quid to spare, he's likely to reach for his lawyer, who in turn will reach out to the judge in an attempt to keep the confidential genie safe inside his lamp.

In reality, we all know that circulation figures play a decisive role in considering whether a risk is worth taking with an individual's privacy. I've been assured by some publishers that "it's our policy to let you know if we intend to publish anything about your client". But is that perhaps more honoured in the breach than in the observance? Even on our side of the fence, we've heard anecdotes evidencing the "it's too risky to tell them" approach. This is where Max Mosley says the law must change, petitioning the European court to require UK law to comply with the Convention by demanding pre-notification to subjects whose Article 8 rights will be breached. The European Court of Human Rights judges are deliberating.

Relaxing with prostitutes

I asked about your sexual proclivities. You might have politely declined to respond, but if I told you I already knew your intimate secrets and was about to pass them on anyway, like most sensible, private people you would have sought to stop this outrageous liberty. Max Mosley had no such choice. Instead, secret film footage of the exercise of him relaxing with five prostitutes in a private basement flat was published on the News Group Newspapers website at the end of March 2008. It was viewed approximately 1.4 million times. Mosley's lawyers complained the next day, resulting in the voluntarily removal of the material and the provision of undertakings not to republish without giving 24 hours' notice. On April 3 that notice was given and the following day Mosley sought an injunction to prevent any further publication.

That was pretty swift action by Mosley's legal team – but not swift enough. Confidential information has been described as "like an ice cube... give it to the party who has no refrigerator or will not agree to keep it in one, and by the time of the trial you have just a pool of water" (Attorney General v Guardian Newspapers 1987, Spycatcher). The viewing figures for the film

footage and 435,000 hits on the online article rather melted Mosley's privacy. Mosley went on to fight for his right to privacy as a matter of principle. And he won, the defendant failing to establish a public interest justification for publication. But his privacy remained breached, and while Mosley got £60,000 for his troubles, what he didn't get was an injunction.

The argument in favour of pre-notification is good on paper. Damages can never make private again what has been exposed for the world to see, so an injunction to prevent this must be the only real remedy. If the opportunity to obtain this remedy is denied, the subject's Article 8 right cannot be sufficiently protected by English law. If the publisher is not obliged to show his hand when a potential privacy invasion is on the cards, then the claimant has no chance at all of obtaining his remedy. But while pre-notification would make the applicant's lot a happier one, there are practical creases to be ironed out.

Would editors have to notify subjects of a story whenever it threatened to stray into Article 8 territory? In practice, few stories don't include something private about the subject. Should it be left to editors to assess the balance between Articles 8 and 10? Surely the editor will usually find his proposed publication to be justified on public interest, public domain or other grounds, notwithstanding the operation of Article 8, or the story would have been off the news list a long time ago (or never on it). Would his assessment then relieve him of his responsibility to notify? Wouldn't that make a mockery of any notification requirement? And to whom would the pre-notification requirement apply, just editors of national newspapers, magazines and television and radio programmes? Or editors of websites, commentators and bloggers? Would it apply to those publishing within the jurisdiction of England and Wales or also those publishing from outside but into that jurisdiction?

No sanction would be acceptable to the media, one suspects, but a pre-notification requirement might not be necessary if the media were more wary of the consequences of wrongly balancing their Article 10 rights against the Article 8 rights of others. A publisher may take a conscious decision to publish in flagrant disregard of an individual's privacy rights simply having done the maths and found, unsurprisingly, that revenue for newspapers sold minus costs and damages for privacy invasion still equals pots of cash for the publisher. But if he could be sanctioned in exemplary damages and punitive costs, that might be a significant disincentive.

Currently, the risk-versus-reward balance is wrong, with newspaper

editors knowing only too well that few subjects – Mosley being an exception – will pursue a High Court action post-publication. The press could take a leaf out of the Ofcom code for broadcasters, which imposes a duty to offer an opportunity to contribute to the broadcast to anyone where omission to do so could be unfair. Failure to abide by this requirement may result in a substantial fine. But the publishing regulator – the press's own beast, the Press Complaints Commission – does not have the power to order fines or other serious sanctions.

Claimant media lawyers can attest to the right balance having been achieved in respect of various privacy injunctions obtained, for example where the media would, unless restrained, have published without authority or justification private details concerning a client's medical condition and treatment, about marriage breakdown, details of a company's recovery plan risking prejudice to the business and threatening vast numbers of jobs.

Injunctions are not handed out like candy

Sometimes, the media have to be kept in check, and currently injunctions are the only way to do so. But let's not deceive ourselves – injunctions are not handed out by judges like candy in a sweet shop. Back in 2001, television presenter Jamie Theakston was unable to prevent the publication of an article that exposed his attendance at a brothel, although the judge did injunct the publication of the photographs taken by one of the women present on the grounds that this would invade his privacy "in a most humiliating way". And footballer John Terry was similarly unsuccessful last year, when Mr Justice Tugendhat found that the real reason for his injunction application was not to protect his private life but to prevent damage to his commercial reputation.

Even where claimants are successful, the media may not always be deprived of a story. Take That's Howard Donald successfully prevented a former partner from talking about the private confidences shared between them, but the anonymity given to him at the outset was later removed – to use the colloquial term, his injunction had been downgraded from "super-injunction" – affording anonymity to the applicant and non-disclosure that an injunction had been obtained – to plain injunction.

Back in 1848, the remedy of an injunction was sought by Prince Albert and ordered by the court, to prevent "a sordid spying into the privacy of domestic life" (Albert v Strange [1848]). Which of us would feel differently if

the privacy shoe were on our foot and the injunction the only option to protect our own domestic life? Some may seek to abuse the remedy of an injunction; most do not and seek only to protect their private lives where there is no proper justification for its exposure, save for satisfying the curious public's appetite for what one judge described as "vapid tittle-tattle".

Amber Melville-Brown is a media law specialist "of counsel" solicitor at private client law firm Withers. Solicitor Natalie McEvoy provided additional research for this article