Head to head

The former president of world motor racing's regulatory body has failed to force media across Europe to give advance notice when publishing private information. Robin Shaw says the European court judgment is good news for free speech, while Amber Melville-Brown warns that public figures are right to feel uneasy about the ruling

Protecting free speech

Max Mosley's failure to persuade the European Court of Human Rights (ECtHR) to prescribe a legal duty on newspapers and other media to give advance notice of a proposed publication of private information has been welcomed by the media and many other commentators.

Such a duty would amount to an unjustifiable interference with fundamental rights of freedom of expression

They were all rightly concerned – as was the ECtHR – that such a duty would amount to an unjustifiable interference with fundamental rights of freedom of expression, which would have a substantial 'chilling effect' on journalism.

The new law sought by Mr Mosley was not restricted to stories about people's sexual behaviour; instead it would have covered all types of journalism (and beyond) including, for example, serious investigative journalism, perhaps involving financial wrongdoing or corruption.

Robin Shaw is a media law specialist lawyer at London-based law firm Davenport Lyons. His colleague, solicitor Emily Barber, also contributed to this article

Real uncertainty

Leaving aside basic practical issues – such as how much notice would be required in any particular case, how much detail and in what form – it was recognised, even by Mr Mosley, that any prior notification requirement would need a 'public interest' exception.

In Mr Mosley's original case in the English High Court, Mr Justice Eady recognised there was significant scope for differing views on the assessment of public interest. So there would be many cases where there was real uncertainty about whether the duty to notify was applicable at all. To this would need to be added the inevitable uncertainty in many cases about whether the proposed publication even engaged privacy rights.

All of this would provide enormous scope for expensive litigation if it were decided not to notify in advance and, after publication, the decision were challenged in the hope of getting damages. The risks of damages and costs associated with publishing in these circumstances would inevitably have an inhibiting effect on journalists.

Publication delays

And what would be the consequence if pre-notification were given? To avoid publication, the recipient of such a notice would have to institute immediate legal action, involving the engagement of specialist lawyers at enormous expense, together with the preparation of substantial written evidence, to get an injunction from a judge, a process that would only be available to the wealthy.

Even if there were no merit in the application, and it failed, the legal process would also lead to delay in publication. And even more delay could be achieved by going to the Court of Appeal.

For example, when in January 2009 solicitor Michael Napier, an ex-President of the Law Society of England and Wales, failed to persuade Mr Justice Eady to grant an injunction to stop the satirical and current affairs newspaper *Private Eye* revealing the unquestionably true fact that he had been reprimanded by his professional body for misconduct, publication was delayed another four months while he pursued an unsuccessful appeal.

But as the ECtHR recognises: 'News is a perishable commodity and a delay to its publication, even for a short period may well deprive it of all its value and interest'. And that is precisely the effect undeserving applicants could use the new law to bring about.

As the loser, Mr Napier had to pay *Private Eye*'s costs. Overall the case is estimated to have cost him £350,000. Of course, the outcome of any court case can never be guaranteed in advance, and few media organisations are going to be willing or able to risk having to pay costs of this magnitude if they end up losing. In other words, the possible costs and delay consequences of prior notification would have had a significant further chilling effect on the media.

Spinning advantage

Of course anyone notified of a story, even if there were no legal basis to apply for an injunction, could use the time before publication to get their side out first in rival publications in a way that was spun to maximum advantage and to minimise any damage. The real prospect of stories being undermined in this way would represent another chilling effect on the media.

The fundamental role that the media plays in informing the public and imparting information and ideas on matters of public interest was acknowledged by the ECtHR, as indeed was the public's right to receive such information. The court commented that if the position were any different, the press would be unable 'to play its vital role of public watchdog'.

Green light to excess

The European Court of Human Rights earlier this month failed to put the brakes on the worst excesses of Britain's Fleet Street and as a result the judges have given a green light to the tabloids to play judge and jury with private lives.

The vehicle through which the court has done this was Max Mosley's privacy case against the UK government. The former president of the *Federation Internationale de L'automobile* had complained in the domestic court about a newspaper exposé of his private sexual behaviour that included surreptitiously obtained photographs and video footage alleging to show Mr Mosley engaging in Nazi concentration camp role-playing with a group of prostitutes.

Mr Mosley had not been notified of the story in advance and by the time he went to court with an emergency application for an injunction to prevent further publication, the material was so widely accessible that Mr Justice Eady concluded that a gagging order against the publisher would have made little practical difference.

Public interest

However, Mr Mosley had more success at the substantive hearing where he won his claim for privacy invasion. The judge found there had been no Nazi element to the role-play – which had it existed could have given the lie to Mr Mosley's assertions that he had distanced himself from the activities of his British fascist party leader father, and hence established a hypocrisy defence. With no public interest defence, there had been an unjustified infringement of his article 8 rights.

Despite a successful legal outcome – Mr Mosley was awarded £60,000 in damages – it was not a successful personal conclusion.

Now, £60,000 (nearly €70,000) is a lot of money. But money is not what a privacy claimant wants. His real remedy is that his private peccadilloes remain private. And that is only possible if he gets the chance to seek an interim injunction before a newspaper takes the decision to publish. This opportunity is only available if he is alerted in advance to the proposed publication.

Tabloid gods

The media argue that in nine cases out of 10, they notify the subject of a story. But they are unlikely to do so where they are confident that public interest grounds or another justification for publication will outweigh the privacy right – and, indeed, that notice would raise the possibility of an injunction.

But who made tabloid editors God? Is it right that they unilaterally weigh these rights in the balance when in reality every bone in their bodies will be crying out 'freedom of speech' and the devil sitting on their shoulders is whispering 'think about sales'?

Surely the decision should be left to the judiciary, properly to balance the article 8 and 10 rights in the particular circumstances and to hold the ring in the meantime with an injunction before any damage is done? If the judge agrees with the media outlet, then the story is printed or broadcast save for a short delay; if he does not, then it is right that the story be spiked.

There has been a huge clamour across Fleet Street, the blogosphere and even in the UK parliament for reform of domestic media laws, with defamation legislation decried as draconian and privacy injunctions pilloried as evil incarnate.

Those in the public eye with private lives to protect may be right to feel uneasy as the juggernaut of the media could be speeding silently towards them

The ECtHR judges in *Mosley* are unlikely to have been deaf to those cries. And while they confirmed that the conduct of the newspaper in this case was 'open to severe criticism', the court found, 'having regard to the chilling effect to which a pre-notification requirement risks giving rise' and the 'significant doubts as to the effectiveness of any pre-notification requirement', the lack of any pre-notification requirement did not constitute a violation of article 8.

Silent dangers

Champagne corks will have popped in editors' offices across the country and around Europe, for the reach of the decision would have extended across the continent into each jurisdiction without a pre-notification requirement. 'Sexposé' stories of the rich and famous may, however, have been piling up in Fleet Street offices as editors awaited the *Mosley* ruling.

With it now clarified that there will be no legislative requirement to notify, no possibility of punitive damages and no sanction from the European Court, those in the public eye with private lives to protect may be right to feel uneasy as the juggernaut of the media could be speeding silently towards them.

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