SEX, CELEBRITIES AND SUPERINJUNCTIONS

Robert Walker (AALS Meeting, Sydney, 11 September 2012)

Judges are well advised not to agree to chair public inquiries. The reasons for avoiding them range from high constitutional principle to the potential damage to the judge's reputation. The judge is, to put it colloquially, on a hiding to nothing. Every judge is well aware of this, and it is only a strong – perhaps even misguided – sense of public duty that induces the judge to take up the poisoned chalice.

All that is true of the remarkable public inquiry at the Royal Courts of Justice in London in which Lord Justice Brian Leveson has been hearing evidence for much of the past year. The procession of witnesses has included present and past prime ministers and cabinet ministers, newspaper proprietors and journalists of all sorts, police officers, and a variety of people whose private lives have been damaged by media intrusion. Some of those people are celebrities, whose fame and fortune depends in part on their symbiotic relationship with the media. Others are ordinary people whose lives have been overtaken by a family tragedy, such as the parents of the murdered schoolgirl, Minnie Dowler, and the McCanns, the parents of the little girl who disappeared on holiday in Portugal.

The British public has been shocked by the evidence of how far very senior politicians and very senior policemen have been in thrall to the media, and in particular to the sections of it controlled by the Murdoch family. Counsel to the inquiry, Robert Jay QC, has been rightly praised for his tenacious questioning, day after day through weeks of the inquiry. Some have suggested that his questions could have been more relentless. But they overlook the fact that some of the witnesses were facing the prospect – since realised – of prosecution for a variety of offences, and there were fair trial issues to be considered.

Lord Justice Leveson has a huge task on his hands. The central problem is how to achieve better regulation of the press without statutory curbs that amount to censorship. This morning I want to address just one aspect of it, that is the present state of English law in providing civil remedies (including prior restraint in the form of an injunction against publication) for intrusions into the private lives of celebrities.

A duty judge who is asked – often initially by way of a telephone call after business hours – to grant an ex parte injunction restraining publication of a news story also has a difficult task on hand. The judge – usually working under great time pressure, and usually with only one

side represented – may have to make a critical examination and assessment of the facts presented in the claimant's written evidence. But the judge must also be clear about the principles in play. Both the right to respect for personal privacy and the right to freedom of expression are very important principes, even in the banal context of "kiss and tell" stories about celebrities who are famous for at least fifteen minutes.

In England the law as to invasion of personal privacy has developed remarkably quickly. It was almost stifled at birth by the unanimous decision of the House of Lords in *Wainwright*[1] in 2003, rejecting a claim by a middle-aged mother and her adult son who had both been humiliatingly strip-searched when visiting her other son in prison. *Wainwright* related to events before the coming into force of the UK Human Rights Act 1998. Had the Act been in force, the case would have been decided differently, since the prison service is a public authority.

The British press and its suppliers, the paparazzi and the private eyes, powerful though they are, are not public authorities. But in two cases, one decided by the Court of Appeal in 2002, and the other by the House of Lords in 2004, it has been established that it is an actionable

civil wrong to disclose personal information about an individual who has a reasonable expectation of privacy for that information, unless there is a sufficient public interest in disclosure.

In the first case, anonymised as *A v B plc*[2], the Court of Appeal lifted an injunction restraining publication of two "kiss and tell" stories about a premier league footballer, on the basis that the public interest in freedom of expression outweighed the footballer's expressed wish to protect his wife and his children – a sentiment that might, in the circumstances, have sounded rather hollow. At the same time the court declared, on the issue of principle, that the rights conferred by Articles 8 and 10 of the European Convention on Human Rights (relating to private and family life, and freedom of expression respectively) were to be absorbed "into the long-established action for breach of confidence ... giving a new strength and breadth to the action".

The judgment of the Court of Appeal, delivered by Lord Woolf CJ, contains some paragraphs giving guidance to lower courts faced with breach of privacy cases. This fifteen-point catalogue was perhaps over-elaborate for such an early stage in the development of the law. It brings to mind Clemenceau's comment on the fourteen points propounded by

[1] *Wainwright v Home Office* [2004] 2AC 406

Woodrow Wilson at the Versailles Conference: "Le bon dieu soi-même n'avait que dix". In the event, not all the guidance has had lasting effect. In particular, Lord Woolf's views on the footballer being an "involuntary role model" have been criticised on two fronts. On the one hand, Lord Hoffmann and others have pointed out that even a celebrity is entitled to some private life. On the other hand, in his recently published essays[3] Sir Stephen Sedley has questioned the "role model" premise with candid realism:

> "One has to wonder what our moral custodians imagine goes on in young people's minds. Possibly, just possibly, a certain number of boys want to grow up playing football like Garry Flitcroft. Is the revelation in the family's Sunday paper that he has been sleeping with a lap dancer going to make them switch to, let us say, Wayne Rooney as their preferred role model? Or is it going to suggest to them that the great thing about being a professional footballer, or any other kind of media star, is that you can sleep with just about anyone? The Court of Appeal held that this was not the court's business. 'The fact that a more lurid approach will be adopted by the publication than the court would regard as acceptable,' it said, 'is not relevant.'
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> It is entirely right that the court has no role as a censor of taste. The right to give offence is a precious component of freedom of expression. But was the question one of taste, or was it whether the substantive content of the article was such as to outweigh Flitcroft's privacy rights? It might well be that a revelation that a professional footballer had been gambling on his own team's fixtures would carry such weight. It is less obvious that how he performs in bed (or, in Flitcroft's case, elsewhere) with a woman who is not his wife does so, even if it makes him – in the paper's lofty prose – a serial love rat."

[2] [2003] QB 195
[3] Sparks and Ashes, CUP (2011) p.314

In *Campbell v MGN Ltd*[4] the House of Lords confirmed that invasion of privacy is now actionable at common law. The actual decision in favour of the super-model Naomi Campbell was as close run as it could be. The Daily Mirror had published a story about her being addicted to narcotics, with a bold headline and a photo of her in the street outside an NA meeting. The story was not particularly hostile but it did point out that she had told the public that she did not take drugs, comparing herself favourably to some other models. The judge awarded her modest damages of £3,500. The Court of Appeal overturned that order. The House of Lords restored it by a three-two majority. The costs were by then several hundred times larger than the damages, a matter that led to separate satellite litigation ending in the Strasbourg Court. In the Lords one of the central issues was whether the Court of Appeal had strong enough grounds for differing from the trial judge's evaluation of the public interest. The publication of the photograph taken outside the NA meeting was also an important factor. More than one of their Lordships referred to the old saying about a picture being worth a thousand words.

In every case the judge has to perform a balancing exercise, weighing the claimant's right to personal privacy against the

[4] [2004] 2 AC 457

countervailing public interest in free speech. In English case-law this process is sometimes dignified by the expression "parallel analysis" but that may give a misleading impression of scientific precision. All it means is that as between the individual's right to private life and the public's right to be informed, neither starts with the benefit of any presumption. In *Re S*[5] Lord Steyn put it like this:

> "First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each."

The facts of *Re S* were unusal and tragic: it was an application on behalf of an eight year old boy to ban media reporting of the trial of his mother for the murder of his elder brother. The judge refused to make the order and this was upheld by the Court of Appeal and the House of Lords. The boy was in any case going to need special care and protection, and the public interest in being informed about the administration of justice is very strong.

An intense focus on the facts of the particular case is not a recipe for predictable outcomes. The judge has to come to an evaluative

[5] [2005] 1AC 593, 603

conclusion and appeal courts will be slow to interfere. Sometimes, indeed, it will be too late to interfere, where the judge has refused to grant an injunction, even to preserve the status quo pending an appeal.

In performing the balancing exercise the judge will take account of some basic factors: who the claimant is, what the proposed publication is expected to disclose and the circumstances in which the story has come to the knowledge of the media. As to the first, if the claimant is an elected politician, a senior public servant or a top businessman, the argument for the disclosure being in the public interest will usually be strong. It is now known that former CEOs of both BP and the Royal Bank of Scotland obtained injunctions against disclosure of information about their private lives, though the first was later discharged for material non-disclosure, and the second was rendered ineffective by disclosure under cover of parliamentary privilege. Footballers, TV personalities and similar celebrities are not public figures in the same way as government ministers, members of parliament and top executives. But they are very much in the public eye. Whether or not they are role models, their high earnings reflect their power to attract public attention and adulation.

As to the second point, the nature of what is to be disclosed, there are obviously different degrees of embarrassment that the claimant may

be at risk of. The disclosure of, for instance, a minor surgical operation is at one end of the scale, and facts such as those in *Mosley v News Group Newspapers Ltd* (to which I shall return) must be near the other end. But the more lurid the facts, the greater (in some cases) may be the public interest in disclosure. The third point, the source of the information, will be relevant in some cases. As the law has developed the breach of a confidence entrusted to a friend or adviser is not essential to the cause of action, but it must add to its cogency. One feature of the evidence at the Leveson inquiry has been the number of celebrities who came to the conclusion that their secrets must have been betrayed by members of their families or friends, when in fact the source was the interception of calls on their own mobile phones.

What celebrities do is news, especially when extra-marital sex is involved. Celebrities are wealthy enough to have ready access to lawyers, and in England the legal profession has not been slow to provide access to prior restraint in order to prevent disclosure of their clients' embarrassing secrets. Swift ex parte applications for injunctions became commonplace and from these developed what have come to be called super-injunctions: orders restraining not only disclosure of information about the claimant, but also disclosure of the fact such an injunction has been granted.

The driving necessity, for a celebrity faced with the threat of an embarrassing disclosure, is to kill the story dead. Celebrities are generally not interested in damages, though there have been a few notable exceptions. As the law has begun to develop lawyers have had to rethink their instinctive reactions to prior restraint. Prior restraint by an injunction against publication is anathema to free speech. Blackstone put this very clearly two and a half centuries ago[6]:

> "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity."

That is the foundation of the rule in *Bonnard v Perryman*, laid down by the English Court of Appeal in 1891. If a defendant has pleaded, or intends to plead justification – that is truth - as a defence in a libel action, the general rule is that an interlocutory injunction restraining publication will not be granted. The position of the rule in the common law of Australia has recently been reviewed in the scholarly but trenchant judgment of Justice Heydon in *ABC v O'Neill*[7].

[6] Commentaries Book 4 pp 151-152, quoted by Auld LJ in *Holley v Smyth* [1998] QB 726, 736-737
[7] (2006) 227 CLR 57

Truth is not a defence to an action for invasion of privacy. The appropriate defence is the more nuanced defence of public interest. That is not to say that questions of fact do not arise in privacy cases. In the case of *Mosley v News Group Newspapers Ltd* , for instance, it was not in dispute that the claimant had participated in mutual flagellation with a number of prostitutes, but the outcome (£70,000 damages) was heavily influenced by the newspaper's failure to prove that there was a nazi theme to what Mr Mosley called a party and the newspaper called a sado-masochistic orgy. Less luridly and more commonly, there may be an issue (very difficult for a judge to resolve without cross-examination) as to how far there is an element of blackmail behind a story about the sexual misconduct of a footballer, TV personality or other celebrity.

An instructive case is *Terry v Persons Unknown*[8]. The claimant was another well-known footballer with valuable sponsorship contracts. He was a married man and he had an affair which he feared was about to be exposed in the press. He applied for a superinjunction, and because his application failed we know precisely what his lawyers were asking for, besides an ordinary injunction: first a private hearing; second anonymity for all concerned; third that the court file should be sealed; fourth prohibition of publication of the fact of the proceedings; and fifth,

prohibition of any third party served with a copy of the order from seeing copies of the materials seen by the judge.

Tugenhat J refused to make any of these orders. He gave a full reserved judgment setting out his reasons, principally that the claimant's real concern was about his sponsorship contracts, rather than his private life; that there was no threat of publication of particularly intrusive details or photographs, as opposed to the fact of the relationship; and that (especially in the absence of named defendants such as the publishers of the News of World) he could not be satisfied that there was no public interest defence.

In his judgment, the judge made an interesting general point[9]:

> "There is no suggestion that the conduct in question in the present case ought to be unlawful, or that any editor would ever suggest that it should be. But in a plural society there would be some that would suggest that it ought to be discouraged. That is why sponsors may be sensitive to the public image of those sportspersons whom they pay to promote their products. Freedom to live as one chooses is one of the most valuable freedoms. But so is the freedom to criticise (within the limits of the law) the conduct of other members of society as being socially harmful, or wrong."

Richard Spearman QC (who has appeared in several of these cases) has commented that this approach is more straightforward than arguments based on role models, but that the difficulty is to know its limits. I am

[8] [2006] EWHC 119
[9] Para 102

inclined to agree. In the passage just quoted the qualification "within the limits of the law" really begs the question.

In 2007 the Court of Appeal dismissed (except on one minor point) an appeal from Eady J in *Lord Brown of Madingley v Associated Newspapers Ltd*[10]. Eady J had initially granted a wide injunction to the claimant, the group chief executive officer of BP, prohibiting publication in the Mail on Sunday of facts about his private life and allegations about the misuse of corporate resources for the benefit of the partner with whom he had a live-in relationship for over three years. At a further hearing the judge restricted the scope of the injunction. The appeal against these restrictions was dismissed, primarily because of the legitimate public interest in the alleged misuse of the resources of one of the world's largest companies, but also on the ground of material non-disclosure. The Court of Appeal quoted the judge's detailed account of a false statement in the claimant's evidence, and how much significance should be attached to it. The judge had said,

> "I am not prepared to make allowances for a 'white lie' told to the court in circumstances such as these – especially by a man who prays in aid his reputation and distinction, and refers to the various honours he has received under the present government, when asking the court to prefer his account of what took place."

[10] [2008] QC 103

That is why I have suggested that it is an oversimplification to disregard the truth or falsity of the information at issue. The court has to undertake a nuanced evaluation of all the material.

Despite Mr Terry's and Lord Brown's expensive failures to save themselves from embarrassment, applications for superinjunctions increased over the next few years[11]. It is hard to obtain reliable statistics, though we know that the Ministry of Justice is now compiling them. It is a worrying trend. Apart from the recent transient euphoria of our Olympic bread and circuses, the past three years have been in many ways an unhappy time for British society. They have brought recurrent financial crises with cuts, redundancy and hardship for hundreds of thousands of people (including many of the junior bar, especially those practising in crime and family law, for which legal aid has been drastically cut). On the other hand, they have brought seemingly ever-increasing rewards for top bankers, top footballers, top TV entertainers (and also, it must be said, some top solicitors and barristers). There is less equality in British society now than there was 10 or 20 years ago. The superinjunction, a remedy available only to the superrich, may be seen as a small but significant symbol of this growing inequality.

[11] A reported example is *X v Persons Unknown* [2007] EMLR 10

Matters came to a head earlier this year, when one member of parliament and one peer used parliamentary privilege to disclose the names of a well-known ex-banker and yet another well-known footballer, contrary to the terms of subsisting injunctions. I suspect that their names were already known to a large part of the adult population of Britain. This use of parliamentary privilege is regrettable. As a former Lord Chancellor, Lord Mackay of Clashfern, has wisely observed, it is not that the courts are trying to control parliament, but we hope that parliament can control itself. Regrettable though it is, this flouting of injunctions may be symptomatic of a general feeling that in this area the influence of the Human Rights Act has not been an unmixed blessing. I have three principal concerns, though they are all linked together in the notion of proportionality, the importance of which Lord Steyn emphasized in the passage I have quoted.

First, the administration of justice in public, and public knowledge of what the courts are doing, is a very important constitutional principle. It has been reaffirmed by the House of Lords in 2004 in *Re S*[12] and again by the Supreme Court in 2010 in an application about anonymity[13]. Serious inroads have been made into the principle, in the interests of national security, by anti-terrorist legislation. Further erosion should be resisted unless it clearly serves the ends of justice. Enabling a rich banker

or a rich footballer to cover up his sexual indiscretions cannot be a routine justification for attempting to impose a blanket of secrecy. This has been recognised by the committee assembled and chaired by Lord Neuberger, then Master of the Rolls, and the committee's prompt report has been accepted by the Lord Chief Justice[14].

Second, judges have often made the neat distinction between what is in the public interest and what interests the public (which may be, in Lady Hale's words, "vapid tittle-tattle"[15]). But is it a bright-line distinction? Here I cannot resist quoting Hoffmann LJ's well-known observations in a case heard by the Court of Appeal some years before the enactment of the Human Rights Act[16]

> "There are in the law reports many impressive and emphatic statements about the importance of the freedom of speech and the press. But they are often followed by a paragraph which begins with the word 'nevertheless'. The judge then goes on to explain that there are other interests which have to be balanced against press freedom. And in deciding upon the importance of press freedom in the particular case, he is likely to distinguish between what he thinks deserves publication in the public interest and things in which the public are merely interested. He may even advert to the commercial motives of the newspaper or television company compared with the damage to the public or individual interest which would be caused by publication.
> The motives which impel judges to assume a power to balance freedom of speech against other interests are almost always understandable and humane on the facts of the particular case before them. Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed

[12] [2005] 1 AC 593
[13] *Application by Guardian News and Media Ltd and others in HM Treasury v Ahmed* [2010] UKSC 1
[14] JCO News Release 19 May 2011
[15] *Jameel v Wall Street Journal Europe* [2007] 1 AC 359, para 147
[16] *R v Central Independent Television plc* [1994] Fam 192, 202-203

> by conditions of commercial advantage. Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute."

Campbell has of course extended the "clearly defined exceptions". But I draw particular attention to Hoffmann LJ's apparent scepticism as to whether there is a bright-line distinction between the public interest and things in which the public are interested.

Like Lord Woolf in *A v B plc* and Tugendhat J in *Terry*, I am reluctant to say that there is *no* public interest (in the serious sense) in the conduct of celebrities whose fame and fortune depends on public adulation. It may not be at a high level – not as high as for politicians, or for those who wield great economic power as top executives of huge companies. But how high, in the average kiss and tell story, is the countervailing human right which the claimant is seeking to protect? If his true motivation is fear of hurting his wife and children, should he not have thought of that before? How sceptical should a judge be, on an application made without notice, of such evidence? It is easy for such a claimant, on his without-notice application, to suggest that the woman

who is offering her story to a Sunday newspaper is guilty of exploitation, if not blackmail. But the economic and emotional dynamics of extramarital sex do not always follow the same pattern. In the case of Mr Terry it was eventually established that the "other woman", herself a minor celebrity, was just as anxious to avoid publicity as he was, and he was ordered to pay the costs of her intervention to rebut his evidence suggesting that she was the source of the story.

Third, we learned as law students that equity does nothing in vain. The majesty of the law is not enhanced by the court ordering someone to achieve what is impossible or futile. The court will not try to use injunctive relief to preserve the confidentiality of what is already in the public domain[17]. Modern technology, with its efficient means of instant communication available to almost everyone, may call for a reconsideration of what, in this context, the public domain means. We have come a long way from the 1930's, when the relationship between the Prince of Wales (later King Edward VIII) and Mrs Wallis Simpson was the subject of daily gossip among those "in the know", but was unknown to most of the population of this country because of a sort of self-imposed censorship by the newspapers and the BBC.

There are therefore real problems about both the proportionality and effectiveness of prior restraint by way of injunction. The remedies available in civil proceedings might be reinforced by a stronger Press Complaints Commission, a possibility that Lord Justice Leveson will undoubtedly be looking into. But, as I have said, statutory regulation of the press, with its affinity to censorship, may not be an acceptable solution.

Thank you for listening. I have posed a lot of questions and provided no clear answers. When Lord Justice Leveson completes his Herculean task, we will learn his considered views on all these issues.

[17] *Attorney-General v Guardian Newspapers (no. 2)* [1990] 1 AC 109