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In Brief

European Parliament approves reforms to data protection law

New data protection rules which aim to create a uniform set of rules across the EU fit for the digital era and introduce a number of supporting reforms were agreed by the European Parliament on April 14, 2016.

Parliament's vote ended more than four years of work on a complete overhaul of EU data protection rules. The overhaul involves a package of two pieces of legislation which will replace the Data Protection Directive (95/46/EC): a general regulation on data processing in the EU, and a Directive on data processed by the police and judicial authorities.

The general regulation is designed to give citizens more control over their own private information. It updates the principles set out in the 1995 Directive to cover, for example, data processed on the internet (for such purposes as social networks, online shopping and e-banking services) and offline (including for hospital and university registers, company registers of clients and personal data held for research purposes). Also included in the new rules are the following provisions:

- the 'right to be forgotten', which will enable any person to request an internet company to erase personal data when that person no longer wants such data to be processed, subject to restrictions (eg where the data is needed for historical, statistical and scientific purposes);
- 'clear and affirmative consent' must be given by the data subject to the processing of his or her private data by another party;
- the right to 'portability' to make it easier for individuals to switch their personal data between service providers (eg by allowing a user to move to another email provider without losing contacts or previous emails);
- the right for data subjects to know their data has been hacked, with companies required to notify the national supervisory authority of serious data breaches as soon as possible so that users can take appropriate measures;
- no more 'small print' privacy policies, with information given in clear and plain language before data is collected;
- stronger enforcement and fines up to 4 per cent of firms' total worldwide annual turnover, as a deterrent to breaking the rules.
- new controls setting limits to the use of 'profiling', the technique used to analyse or predict matters relating to a particular person (eg performance at work, economic situation, location, health etc) based on the automated processing of his/her personal data.

The data protection package also includes a Directive on data transfers for policing and judicial purposes. It will apply to data transfers across borders within the EU as well as, for the first time, setting minimum standards for data processing for policing purposes within each Member State.

The new rules aim to protect individuals, whether victims, criminals or witnesses, by setting out clear rights and limitations on data transfers for the purpose of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. These include safeguarding against and preventing threats to public security, while at the same time facilitating smoother and more effective cooperation among law enforcement authorities.

The regulation will enter into force 20 days after its publication in the *Official Journal*. A two year transition period is being allowed for organisations to make the required changes.

Google accused of abusing dominant position on Android operating system and applications

The European Commission has informed Google of its preliminary view that the company has, in breach of EU antitrust rules, abused its dominant position by imposing restrictions on Android device manufacturers and mobile network operators.

The Commission's view is that Google has implemented a strategy on mobile devices to preserve and strengthen its dominance in general internet search. These concerns are outlined in a statement of objections announced on April 20, 2016 and addressed to Google and its parent company, Alphabet.

Smartphones and tablets account for more than half of global internet traffic, and are expected to account for even more in the future. About 80 per cent of smart mobile devices in Europe and in the world run on Android, the mobile operating system developed by Google. Google licenses its Android mobile operating system to third party manufacturers of mobile devices.

The Commission opened proceedings in April 2015 concerning Google's conduct as regards the Android operating system and applications. In the statement of objections the Commission alleges that Google has breached EU antitrust regulations by:

- requiring manufacturers to pre-install Google Search and Google's Chrome browser and requiring them to set Google Search as default search service on their devices, as a condition to license certain Google proprietary apps;
- preventing manufacturers from selling smart mobile devices

running on competing operating systems based on the Android open source code;

- giving financial incentives to manufacturers and mobile network operators on condition that they exclusively pre-install Google Search on their devices.

In the Commission's view these business practices may lead to a further consolidation of the dominant position of Google Search in general internet search services.

CMA acts to curb undisclosed advertising in online articles

The Competition and Markets Authority (CMA) has secured undertakings to tackle undisclosed advertising in online articles and blogs.

The undertakings were secured following a CMA investigation under its consumer enforcement powers. The CMA's investigation found two marketing companies, Starcom Mediavest and TAN Media, arranged for endorsements in online articles and blogs on behalf of MYJAR, a short-term loan provider, without making it clear that they were advertising. This activity was carried out as part of their search engine optimisation (SEO) activities.

MYJAR, Starcom Mediavest and TAN Media have all provided undertakings to the CMA that they will ensure all advertising and other marketing in articles and blogs is clearly labelled or identified so that it is distinguishable from the opinion of a journalist or blogger. The three businesses all engaged constructively with the CMA during its investigation.

The CMA has also written to 13 marketing companies, 20 businesses that use the services of marketing companies and 33 publishers of online articles and blogs, to warn them that helping to arrange or publish advertising or other marketing that is not clearly distinguishable from the opinion of a journalist or blogger may result in them breaking the law. The CMA has published open letters on its website so that all businesses, marketing companies and publishers are able to look at the steps they need to take to comply with consumer protection law.

This is the third announcement that the CMA has made recently aimed at maintaining consumers' trust in what they read online in connection with shopping for goods and services. After a separate investigation, the CMA announced in February that five online review sites have agreed to improve their practices in response to concerns raised by the CMA.

The CMA also announced in March, following another separate investigation, that it had taken enforcement action against a marketing firm that, in 2014 and 2015, had written over 800 fake positive reviews for 86 small businesses that were published across 26 different websites which contain customer reviews.

Trade Secrets Directive is approved by Parliament

The European Parliament has voted to adopt the Trade Secrets Directive, which will introduce an EU-wide definition of 'trade secret' and set out the remedies available to the holders of such secrets in the event of misappropriation.

The Directive defines the term as meaning information which is secret, has commercial value because it is secret, and has been subject to reasonable steps to keep it secret. EU Member States will be obliged to ensure that victims of misuse of trade secrets are able to defend their rights in court and to seek compensation. The agreed text also lays down rules to protect confidential information during legal proceedings.

Throughout the negotiations with ministers, MEPs stressed the need to ensure that the legislation does not curb media freedom and pluralism or restrict the work of journalists, in particular with regard to their investigations and the protection of their sources. Under a rules agreed between Parliament and Council negotiators in December 2015, victims of the theft or misuse of trade secrets will not have the right to redress if a trade secret was acquired, used or disclosed for the following purposes:

- to exercise the right to freedom of expression and information as set out in the EU Charter of Fundamental Rights, including respect for freedom and pluralism of the media;
- to reveal misconduct, wrongdoing or illegal activity, provided that the respondent acted in order to protect the general public interest (such as public safety, consumer protection, public health or environmental protection);
- to protect a legitimate interest, recognised by EU or national law;
- the trade secret was disclosed by workers to their representatives as part of the legitimate exercise of their representative functions in accordance with EU or national law, provided that such disclosure was necessary for that exercise.

The text of the draft Directive was informally agreed with ministers before the Parliament's vote on April 14, 2016, and it expected to be adopted by the Council at its next sitting. Once the Directive is adopted, Member States will have two years in which to implement its provisions into national law.

ICO publishes updated direct marketing guide

The Information Commission's Office (ICO) has published an updated version of *Direct marketing*, which provides guidance on how the Data Protection Act and the Privacy and Electronic Communications Regulations impact on the industry.

The guide is designed to help organisations ensure that marketing calls and texts are made in line with the law, and that firms follow good practice. Nuisance calls to consumers remain a contentious issue, and the government has confirmed that from May 16, 2016 direct marketing companies registered in the UK will need to display their telephone numbers when making unsolicited calls, even if their call centres are based abroad. Cold callers will thus be prevented by law from hiding or disguising their telephone numbers.

Baroness Neville-Rolfe, Parliamentary Under Secretary at the Department for Business, Innovation & Skills, recently added her voice in support of issuing the ICO's guidance as a code of practice with specific statutory recognition, which would allow it to be considered by the courts. Such a move would require a full consultation and legislative change.

Press codes and the spirit of equalities legislation: implementing Leveson

Jonathan Heawood and Brigit Morris

Introduction

In his Report into the Culture, Practices and Ethics of the Press, Lord Justice Leveson grappled with the challenge of what he called 'discriminatory reporting', whereby women or minority groups are singled out for hostile treatment by news publishers.¹ Leveson noted that the standards code upheld by the Press Complaints Commission (PCC) prohibited reporting that was 'prejudicial or pejorative' about individuals, but not reporting that was similarly hostile towards women or minority groups in general. He asked whether this distinction was logical or appropriate.

Some witnesses to the Leveson Inquiry argued that discriminatory reporting causes harm, whether or not specific individuals are named, and that it should therefore always be prohibited.² Others expressed concerns that regulatory interventions in this area would interfere with the right of news publishers to run shocking or offensive material.³ They argued that this would inhibit vigorous public debate on, for example, questions of migration.⁴ Rather than reconcile these conflicting positions, Leveson recommended that a new regulator should give 'consideration' to amending its standards code to 'reflect the spirit of equalities legislation' – 'while fully protecting freedom of speech and the freedom of the press'.⁵ In effect, he bounced the problem back to the regulator.

In this paper, we do not form a judgment on the merits of the recommendation, though we note the challenges it presents to any press regulator. In the first part of the paper, we review the evidence that Leveson heard regarding freedom of speech and equalities and consider some relevant legal standards in these areas. In the second part of the paper, we look at discrimination provisions among the standards codes of 21 European press councils. We find that these press councils have taken a wide variety of approaches to the question of how to reconcile freedom of speech with respect for equalities. We conclude by identifying the code which appears to come closest to satisfying Leveson's recommendation, whilst highlighting the need for further research.

Leveson and the spirit of equalities legislation

The Leveson Inquiry into the Culture, Practices and Ethics of the Press was launched in response to concerns about phone hacking

by journalists and private investigators employed by the *News of the World* newspaper.⁶ However, the Inquiry's terms of reference rapidly led Leveson into broader questions of journalism ethics.⁷ He showed a particular interest in the 'discriminatory treatment of women and minorities in the press'.⁸ He heard evidence on this topic from groups representing the concerns of British Muslims, refugees and asylum-seekers, trans and intersex people, women and girls and mentally and physically disabled people.⁹ These groups and other witnesses, such as the National Union of Journalists (NUJ) and academic experts, testified that the regulation of the press by the Press Complaints Commission (PCC) had not created adequate safeguards against discriminatory reporting.

Michelle Stanistreet, General Secretary of the NUJ, presented evidence regarding the 'inflammatory and blatantly inaccurate coverage of so-called gypsies coming to the UK during the enlargement of the EU'.¹⁰ Inayat Bunglawala of ENGAGE drew attention to instances of 'clear falsehood' in relation to issues concerning Muslims or Islam, 'where newspapers just tell plain falsehoods in their headline, where they seem to be [fomenting] prejudice'.¹¹

These witnesses and others suggested that either the Editors' Code of Practice, or its enforcement by the PCC, or both, were at fault. Anna Heeswijk of OBJECT called for the regulation of the press to be 'consistent with the regulation of other forms of media' and said that press regulation 'should be guided by equality legislation' so that 'any messages and images which would not be considered suitable for the workplace under those pieces of legislation should not be printed and readily accessible within unrestricted newspapers'.¹² Similarly, Professor Jennifer Hornsby argued that 'the press must have a special role in ensuring equal treatment, so that, for instance, it has an obligation when reporting a story not to make needlessly pejorative reference to a group'.¹³

How do these suggestions relate to the Editors' Code of Practice? The Editors' Code was first drafted in 1991 by the Editors' Code of Practice Committee, consisting of serving newspaper editors, and evolved over the years to address a number of issues in journalism ethics. Clause 12 of the Code is headed 'Discrimination' and reads as follows:

1. The press must avoid prejudicial or pejorative reference to an individual's race, colour, religion, gender, sexual orientation or to any physical or mental illness or disability.

2. Details of an individual's race, colour, religion, sexual orientation, physical or mental illness or disability must be avoided unless genuinely relevant to the story.

This clause seeks to protect individuals from discriminatory reporting, but it does not allow for complaints from, or on behalf of, groups. For example, an individual might complain about a pejorative reference to their identity as a Muslim, but no-one could complain under the Editors' Code about pejorative references to Muslims in general, or to the characteristics of any other group identified by reference to race, colour, religion, gender, sexual orientation or to any physical or mental illness or disability.

Clause 1 of the code requires publishers to take care not to publish 'inaccurate, misleading or distorted information'. Whilst the PCC was open to complaints under this provision from people directly affected by a publication, it was not open to complaints from third parties in relation to issues such as the inaccurate headlines cited by Inayat Bunglawala in a hearing to the Leveson Inquiry.¹⁴

Leveson questioned the Chair of the PCC, Lord Hunt of Wirral, about this. He told Lord Hunt that he had heard from many groups who conveyed a concern (which Leveson said he recognised 'very, very clearly') 'that they feel that there is simply no mechanism through the PCC whereby they can get redress for what are considered to be egregious distortions of fact and unbalanced stories.'¹⁵ He challenged Lord Hunt to find 'some way between freedom of expression on the one hand [...] and [this] type of complaint.'

Lord Hunt responded by saying that to allow group complaints in relation to discrimination 'wouldn't be in the public interest' because it would 'open up the possibility of allowing the code to be systematically abused by those whose principal or sole aim is to restrict freedom of expression.' Hunt did not substantiate his claim that the aim of group complainants would be to 'restrict freedom of expression'. Nonetheless, his comments chimed with those of other witnesses.

Stephen Abell, a former Director of the PCC, described 'the right of the press to comment freely and vigorously on matters that [are] well established in the public domain'.¹⁶ George Osborne, Chancellor of the Exchequer, said 'yes, by all means respect the right and dignity of individual groups, but if that prevents you airing issues that large numbers of people in this country have quite strong views about, then I think you are in difficult territory'.¹⁷ He gave migration as an example of one such issue.

The conflicting evidence heard by the Inquiry in this area straddles a fundamental fault-line in the human rights framework. If human rights exist to protect human dignity, we should place restraints on hostile expression, whether aimed at individuals or groups. But if human rights exist to protect freedom, we should not impose such restraints, not only because they compromise individual liberty but also because they create opportunities for censorship, which may be exploited either by the state or by powerful groups within society – 'allowing the code to be systematically abused by those whose principal or sole aim is to restrict freedom of expression', in the words of Lord Hunt.¹⁸

The jurisprudence of the European Court of Human Rights (ECtHR) reflects the tension between these strands of thinking. There have been numerous judgments in the ECtHR regarding the appropriate balance between freedom of speech and restrictions

on speech that is offensive or that incites hatred or violence. In *Handyside v The United Kingdom*, the court ruled that freedom of expression not only extends to information and ideas that are 'favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.'¹⁹ However, in *Erbakan v Turkey*, the court found that the promotion of tolerance and respect in democratic societies necessitates, in some circumstances, the need to 'sanction or even prevent all forms of expression which spread, incite or promote or justify hatred based on intolerance'.²⁰

This latter dignitarian or communitarian strand in the court's thinking is also found in various pronouncements of the Council of Europe. For example, a 1993 resolution on the Ethics of Journalism stated that 'the media have a moral obligation to [...] reject all discrimination based on culture, sex or religion.'²¹ Also, a 2001 recommendation by the Committee of Ministers urged the media to take care 'not to contribute to stereotypes about members of particular ethnic or religious groups and to sexist stereotypes'.²²

These different strands of human rights discourse are both apparent in the Leveson Report. In a section headed 'Impact on public discourse', Leveson attempts to draw them together. The conclusion to this section warrants close reading as it captures the thinking which animates his recommendations in this area:

*The evidence touched on here [...] includes reporting which falls at different points along a spectrum: some may be contentious, opinionated and partial, while still complying with the standard set [in the Editors' Code]; others may be inaccurate, prejudicial and discriminatory, and fall clearly on the wrong side of that standard. What is clear is that a critical mass of articles which breach the standard can have seriously deleterious effects on public discourse and community relations.*²³

In this passage, Leveson first echoes the liberal stance taken by the PCC, allowing for reporting which may be 'contentious, opinionated and partial'. He then contrasts this with reporting which may be 'inaccurate, prejudicial and discriminatory' and suggests that it is possible to distinguish between the former and the latter. He does not say how to make such a distinction. His communitarian approach becomes more pronounced when he says that it is 'clear' that a critical mass of inaccurate, prejudicial or discriminatory publications may have a 'seriously deleterious' impact on 'public discourse'.

Three of Leveson's recommendations speak directly to the question of discriminatory reporting. One concerns the contents of the code:

The code must take into account the importance of freedom of speech, the interests of the public (including the public interest in detecting or exposing crime or serious impropriety, protecting public health and safety and preventing the public from being seriously misled) and the rights of individuals. Specifically, it must cover standards of:

- (a) *conduct, especially in relation to the treatment of other people in the process of obtaining material;*
- (b) *appropriate respect for privacy where there is no sufficient public interest justification for breach and*
- (c) *accuracy, and the need to avoid misrepresentation.*²⁴

This recommendation sets out the minimal requirements which Leveson felt should be reflected in any standards code. These requirements have now been enshrined in the Royal Charter on Self-Regulation of the Press ('the Charter'), which translates a number of Leveson's recommendations into criteria which a self-regulatory body must meet in order to be recognised by the Press Recognition Panel (PRP). Leveson's reference to the rights of individuals appears carefully worded to avoid requiring a regulator to take into account the rights of groups. To this extent, his recommendations do not address the concerns which were raised by the witnesses quoted above.

However, in a second recommendation, Leveson creates new opportunities for groups to make complaints, recommending that a regulator should have:

*[...] the power (but not necessarily in all cases depending on the circumstances the duty) to hear complaints whoever they come from, whether personally and directly affected by the alleged breach, or a representative group affected by the alleged breach, or a third party seeking to ensure accuracy of published information. In the case of third party complaints the views of the party most closely involved should be taken into account.*²⁵

This recommendation is also enshrined in the Charter (modified so that the regulator is only obliged to consider group complaints where there is a 'public interest' in their doing so). Leveson considered that, by giving a regulator the power to take complaints from third parties and representative groups, he may have sufficiently addressed the issue of discriminatory reporting.²⁶ Nonetheless, he made a third recommendation in this area, saying:

*I recommend that consideration should also be given to Code amendments which, while fully protecting freedom of speech and the freedom of the press, would equip that body with the power to intervene in cases of allegedly discriminatory reporting, and in so doing reflect the spirit of equalities legislation.*²⁷

This recommendation does not feature as a recognition criterion in Schedule 3 of the Charter. However, the PRP may take into account a regulator's compliance with criterion 38 when determining an application for recognition.²⁸ It is, in this respect, a desirable but not an essential requirement for a Charter-compliant self-regulatory body.

Through the combination of these three recommendations, Leveson sought to address concerns about discriminatory reporting. He said that a standards code must take into account 'the importance of freedom of speech' and 'the rights of individuals', whilst covering standards of 'accuracy, and the need to avoid misrepresentation'.²⁹ The Editors' Code of Practice appears to satisfy these requirements. To that extent, this is not a burdensome or radical recommendation.

Leveson's recommendation that a regulator should have the power to hear complaints from 'a representative group affected by the alleged breach, or a third party seeking to ensure accuracy of published information' would have the effect of allowing groups such as ENGAGE to complain to a regulator about inaccurate or misleading reports about Islam or Muslims under the Editors' Code – but not to make a complaint under the discrimination clause of the Editors' Code, because that clause applies only to individuals, which is presumably why Leveson urged a regulator to consider amending its standards code to 'reflect the spirit of

equalities legislation'. This final recommendation is potentially the most radical of all. But what does it mean?

In the UK, 'equalities legislation' refers to the Equality Act 2010 which brings together over 116 pieces of legislation, including the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995.³⁰ The Act lists age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation as protected characteristics. It requires public bodies, employers and transport providers to ensure that a person is not discriminated against on the basis of one or more of these characteristics. Section 26 of the Act requires members of the public more generally not to cause 'harassment' to one another on the grounds of one or more protected characteristic. Harassment is defined as follows:

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

The guidance to this section of the Act gives an example of behaviour which might fall under this provision: 'An employer who displays any material of a sexual nature, such as a topless calendar, may be harassing her employees where this makes the workplace an offensive place to work for any employee, female or male.'

This provision is clearly what Anna Heeswijk of OJBECT had in mind when she told Leveson that press regulation 'should be guided by equality legislation that already exists' so that 'any messages and images which would not be considered suitable for the workplace under those pieces of legislation should not be printed and readily accessible within unrestricted newspapers'.³¹ It is reasonable to assume, therefore, that section 26 of the Equality Act 2010 captures 'the spirit of equalities legislation', which is cited in Leveson's recommendation.

In effect, Leveson was asking a regulator to consider proscribing news content as discriminatory where it creates an 'intimidating, hostile, degrading, humiliating or offensive environment' for a person defined on the basis of a relevant protected characteristic. This seems to meet Heeswijk's call for the regulation of the press to be 'consistent with the regulation of other forms of media', as it would bring press regulation in line with broadcast regulation. For instance, section two of Ofcom's Broadcasting aims to ensure the provision of 'adequate protection for members of the public from [...] harmful and/or offensive material'.³²

Any provision along these lines would represent a major change from the standards currently required by the Editors' Code of Practice. For instance, it could create the possibility of complaints made on the grounds of offence. How might such complaints be determined? If offence is a subjective category, is a regulator always obliged to find in favour of a complainant who is offended – however far-fetched their reason for feeling offended may appear? Conversely, if an objective test is to be applied, how might such a test be structured? Should complaints of offence

in relation to religion be treated the same way as complaints of offence in relation to characteristics such as race or disability? Religions and beliefs are systems of ideas in a way that race and disability are not, and might therefore be said to be open to legitimate debate in a way that race and disability may not.

Leveson's proposal here constitutes more of a challenge than a recommendation. In the remainder of this paper, we do not set out to provide a definitive response to this challenge. Instead, we consider a range of relevant provisions in the codes of comparable press councils across Europe in order to establish whether and how these press councils have addressed similar issues in their own jurisdictions.

European press codes

For the purposes of a productive comparison, we have focused on the codes used by press councils in countries which are (a) members of the Council of Europe and (b) placed above the United Kingdom in the *Reporters Sans Frontières Press Freedom Index 2015* ('the Index').³³ This methodology gives us codes from 21 countries to consider.³⁴ These countries have strong constitutional protections for freedom of expression and press freedom under the European Convention of Human Rights (ECHR), and are deemed by impartial human rights observers to meet their obligations – as evidenced by their comparatively high ranking in the Index. Our criteria exclude countries such as Russia, Turkey and Hungary, which, despite their membership of the Council of Europe, fall considerably below the UK in the Index.³⁵

Some critics of the Leveson Report have argued that, by recommending statutory underpinning for press regulation, it jeopardised 'three hundred years of press freedom' in the UK, or threatened to place the UK well below other countries in terms of press freedom.³⁶ However, a high ranking in the Index does not necessarily preclude a statutory framework for press regulation of the kind recommended by Leveson. Some of the press councils in our study might be described, in accordance with the taxonomy in Lara Fielden's comparative analysis, as 'self-regulatory' bodies, others as 'independent' and some as 'co-regulatory', with a blend of statutory and self-regulatory elements.³⁷ Both the Danish and Irish Press Councils, for instance, practise forms of co-regulation. The Danish Press Council was established under the *Media Liability Act 1992* (amended 2014) and is subject to oversight by the Minister of Justice. The Irish Press Council was established under the *Defamation Act 2009* and is also overseen by the Minister of Justice in that country. Denmark is ranked third in the Index and Ireland eleventh. Clearly, statutory involvement in press regulation does not – in the absence of other factors – jeopardise a country's standing on the Index. Thus these 21 codes are indeed relevant for the purposes of our comparison.

Fielden did not look in detail at the standards codes of the press councils in her study but she outlined their function – 'to set standards against which complaints may be assessed' – and acknowledged the 'complexities of potentially competing rights and duties' which they are bound to reflect.³⁸ And she claimed that the codes she studied 'are consistent with the law but go beyond it in relation to ethical standards'.³⁹

There are in fact few comparative international studies of press codes.⁴⁰ This may be due to the methodological difficulties of comparing media or press codes given that many nations do not have a single, centralised press council or comparable body which is responsible for developing a standards code.⁴¹

Tiina Laitila conducted a comparison of 30 European codes in 1995.⁴² Although the study is over twenty years old, Laitila's comparison is useful as the range of nations is restricted to Europe. Laitila found 13 common themes – including the prohibition of discrimination on the basis of an individual's personal characteristics – present in all of the codes. The most common principles Laitila identified emphasised 'different aspects of truthfulness, the need to protect the integrity and independence of journalists, the responsibility of journalists in forming public opinion, fair means in the gathering and presentation of information, protection of the rights of sources and referents, and the freedom to express and communicate ideas and information without hindrance'.⁴³

Through comparing 21 European codes, the authors have found – in contrast to Laitila's conclusions – that not all codes include explicit prohibitions of discrimination on the basis of an individual's personal characteristics.

We have identified three broad categories of provision: incitement provisions, which restrict content only if it actively incites hatred or violence; rights-based provisions, which seek to protect individuals from discriminatory reporting but not groups; and discursive harm provisions, which appear to protect groups from offensive content.

Given that the groupings are not mutually exclusive, some codes include provisions in more than one category. For example, the Spanish code includes both an incitement provision and a rights-based provision.⁴⁴ For the purposes of this analysis, we have identified each press council by its most restrictive provision. This shows that the press council in one country (Iceland) contains no explicit discrimination provision whatsoever; the press councils in two countries (Slovakia and the Czech Republic) proscribe content which incites hatred or violence but do not appear to contain any other restrictions on discriminatory reporting; the press councils in 12 countries (Finland; Norway; Denmark; Netherlands; Sweden; Estonia; Switzerland; Cyprus; Portugal; Latvia; Lithuania; and Spain) set out to protect the rights of individuals; and the press councils of six countries (Austria; Ireland; Germany; Belgium; Poland; and Luxembourg) proscribe content which may cause offence to groups of the population.

Incitement provisions

Whilst several press councils include incitement provisions in their codes, only two include no more than incitement provisions. The Slovak code provides that journalists must not 'promote aggressive wars, violence and aggressiveness as the means of international conflicts solution, political, civic, racial, national, religious and other sorts of intolerance'.⁴⁵ It has nothing else to say on the subject of discrimination. Likewise, the Czech code states that 'journalists must not create or shape any subject in such a manner as to incite discrimination on the basis of race, skin colour, religion, gender, or sexual orientation'.⁴⁶ In practice, it may be that these provisions function very similarly to the discursive harm provisions discussed below. However, on the face of it, these codes appear to give regulated publishers in these countries considerable latitude to publish content which may be offensive, shocking or disturbing, to either groups or individuals – so long as it does not 'promote aggressiveness' or 'incite discrimination'.

Rights-based

By far the most common category of provisions in this study are those which seek to protect individuals (but not groups) from discriminatory reporting. Twelve of the 21 codes here fall into this

category and the Editors' Code of Practice in the UK also includes such provisions. Timothy Toulmin, a former Director of the PCC, set out the philosophy behind this approach in his evidence to the Leveson Inquiry. He told the Inquiry that 'under the umbrella of freedom of expression, we have a broad discretion to [...] write provocative pieces about nationalities, write jokes about women or whatever, and I think that's what [the Editors' Code is] designed not to let the PCC intrude into', but that 'the point of the code, really, so far as it protects the public, is about the people who are in the newspapers and magazines, people who are in the media. It's about protecting their rights'.⁴⁷ In a similar spirit, the codes in this category seek to uphold the rights of identifiable individuals but not to address the impact of potentially discriminatory reporting on public discourse generally.

There are two main ways that these codes protect the rights of individuals: firstly, by calling for subjects to be treated with respect; and secondly, by asking publications to consider the relevance of any reference to a subject's characteristics. Some codes (including the Editors' Code of Practice) include both forms of provision.

The press councils in those countries which are most highly-ranked for press freedom tend to focus on the issue of relevance. The Finnish code tells publishers that the 'ethnic origin, nationality, sex, sexual orientation, convictions or other similar personal characteristics may not be presented in an inappropriate or disparaging manner'.⁴⁸ The Norwegian code asks publishers to 'respect a person's character and identity, privacy, race, nationality and belief. Never draw attention to personal or private aspects if they are irrelevant'.⁴⁹ The Danish code asks court reporters not to include details of 'a person's family history, occupation, race, nationality, creed, or membership of organisations [...] unless this has something directly to do with the case'.⁵⁰ The Dutch code provides that publications should 'only state the ethnic origins, nationality, race, religion and sexual nature of groups and persons only if this is required for the context of the news item reported on'.⁵¹ The Swedish code tells journalists not to 'emphasize ethnic origin, sex, nationality, occupation, political affiliation, religious persuasion or sexual disposition in the case of the persons concerned if such particulars are not important in the specific context and demeaning'.⁵² Finally, the Estonian code states: 'It is not recommended to emphasize nationality, race, religious or political persuasion and gender, unless it has news value'.⁵³

Finland, Norway, Denmark, the Netherlands, Sweden and Estonia are among the ten most highly ranked countries in the Press Freedom Index. Without further research into the intersection between the codes and related areas of law in these jurisdictions, it would be wrong to conclude that these rights-based relevance provisions are causally linked to strong protections for press freedom. We should also note that Austria (at number 7), Germany (at number 11) and Ireland (at number 12) are also ranked highly in the Index, and include – as we shall see – far more sweeping provisions against discriminatory reporting, with potentially serious impacts on the freedom of speech of journalists and news publishers. Nonetheless, this correlation between high levels of protection for press freedom and low levels of interference with potentially discriminatory reporting is striking.

The Swiss, Cypriot, Latvian, Lithuanian and Spanish codes focus on respect for individuals rather than the question of relevance. Some of these provisions are quite vaguely worded. For instance, the Latvian code asks journalists to 'respect a person's private life, nationality, race identity and religious beliefs' but gives no further information as to what might constitute respect (or disrespect).⁵⁴

The Lithuanian code, by contrast, asks journalists and publishers not to 'humiliate or mock an individual's family name, race, nationality, ethnicity, religious convictions, age, sex, sexual orientation, disability or physical deficiencies even if such individual has committed a crime'.⁵⁵ The impact of the Latvian code is highly contingent on the interpretation of the word 'respect', whilst the Lithuanian code provides, for better or worse, greater clarity both to regulated publishers and to members of the public.

Whilst most respect-oriented rights-based codes include lists of protected characteristics which are similar to the list in the *Equality Act*, some include features which would raise eyebrows in the UK. The Swedish code, for example, asks journalists not to refer to a person's 'occupation' whilst the Estonian code protects people's 'political persuasion'. And the Cypriot code includes 'social origin, property or origin or age or other status' in its list of protected characteristics.⁵⁶

Some provisions in our rights-based category may in fact fall into the discursive harm category considered below. For example, the Portuguese code asks journalists not to 'treat people in a discriminatory way, based on their colour, race, nationality or gender'.⁵⁷ Without knowing whether 'people' is considered by the Portuguese press council to extend to groups, we cannot place this provision with total confidence in the discursive harm category.

Discursive harm

We categorise as 'discursive harm' provisions which seek to restrict content on the basis that (to paraphrase the Equality Act) it may create an intimidating, hostile, degrading, humiliating or offensive environment for groups on the basis of that group's protected characteristic – but which do not look for evidence of harm to identifiable individuals, or incitement to hatred or violence. The wording of these provisions varies between the six codes identified under this heading, with correspondingly varied implications for journalistic behaviour.

The most restrictive codes in this group include provisions against content which may be offensive to groups identified only on the basis of their beliefs. The Austrian code provides that 'any disparagement or derision of religious teachings or recognised Churches and religious communities liable to give justified offence shall be inadmissible'.⁵⁸ The German code similarly states that 'the press will refrain from invective against religious, philosophical or moral convictions'.⁵⁹ And the Polish code declares that publications which 'injure the feelings of the religious persons and unbelievers, the national feelings, the human rights, cultural individualities [...] are absolutely prohibited'.⁶⁰

Clearly, any rulings under these provisions might come down to competing interpretations of terms such as 'justified offence' or 'invective'. Nonetheless, they create the expectation that news publishers regulated by these press councils will be restricted from publishing content on the basis that it might offend groups identified by reference to their beliefs, rather than – for example – their race or gender. This might satisfy some witnesses to the Leveson Inquiry but it is hard to reconcile with the right – set out in the ECtHR judgement in *Handyside* – to 'offend, shock or disturb the State or any sector of the population' or the expectation that one function of a free press is to hold the state and other powerful bodies (such as religious groups) to account.

Other discursive harm provisions appear to come closer to what Leveson meant by his reference to the 'spirit of equalities legislation'. The Irish code, for example, combines a discursive harm

provision with an incitement provision: 'Newspapers and periodicals shall not publish material intended or likely to cause grave offence or stir up hatred against an individual or group on the basis of their race, religion, nationality, colour, ethnic origin, membership of the travelling community, gender, sexual orientation, marital status, disability, illness, or age'.⁶¹ Similarly, the Belgian code 'opposes all discrimination based on sex, race, nationality, language, religion, ideology, culture, class or conviction, provided that the convictions thus professed are not in contradiction with the respect for fundamental human rights'.⁶²

These two codes appear to come closest of any of the codes considered here to achieving Leveson's objective. Although the characteristics they list are not identical to the protected characteristics in the Equality Act, they undoubtedly create the possibility of group complaints in relation to discrimination, which appears to be part of Leveson's intention. Rulings under the Belgian code might well turn on the press council's interpretation of what is and is not 'in contradiction with the respect for fundamental human rights'.⁶³ Would this, in practice, allow for vigorous criticism of certain religious beliefs or practices, whilst still protecting religious believers from discriminatory reporting? If so, would this effectively reconcile the competing demands in Leveson's recommendation? Again, it is hard to fully grasp the implications of this provision without knowing how it has been interpreted in practice. But it may offer a useful model of a Leveson-compliant provision in this area.

Conclusion

This article has explored the background to and implications of Leveson's recommendation that a press regulator in the UK might reflect the spirit of equalities legislation in its standards code. We have not considered the merits of Leveson's recommendation. Instead, we have sought to understand Leveson's intention in making the recommendation, and to provide some relevant examples of ways in which similar objectives have been achieved in the press codes of 21 European states.

We have found that, in posing this challenge to press regulators in the UK, Leveson was attempting to reconcile two opposing strands in the evidence heard by his Inquiry, relating on one hand to the potential harm caused by discriminatory reporting and on the other to the importance of freedom of speech on matters of public debate. These strands reflect principles which have been the subject of extensive commentary by international human rights courts and treaty bodies.

We have found that similar tensions are evident in press codes across Europe. Some press councils err on the side of imposing fewer restrictions on the freedom of speech of news publishers or journalists. These include the press councils in Iceland, the Czech Republic and Slovakia. Others err on the side of imposing higher restrictions in the interests of human dignity or community relations. These include the press councils of Austria, Germany, Ireland, Belgium, Poland and Luxembourg. The majority of press codes, like the existing Editors' Code in the UK, restrict content which is disrespectful towards identifiable individuals, or which includes references to one or other of their protected characteristics where these are irrelevant to the story, but do not otherwise seek to mitigate any risk of harm to public discourse or community relations as a result of discriminatory reporting.

Of the 21 codes we have studied, the codes of Ireland and Belgium arguably come closest to meeting Leveson's desire for a provision which reflects 'the spirit of equalities legislation' while 'fully protecting freedom of speech'. The Irish code restricts only content which causes 'grave offence' or which stirs up 'hatred', while the Belgian code opposes discriminatory reporting in general – except insofar as the group discriminated against itself holds views which are incompatible with fundamental human rights. In practice, this might allow discretion for publications which were calculated to 'offend, shock or disturb' certain religious or ideological groups with extreme beliefs or practices. And this, in turn, might satisfy the challenge of reconciling the spirit of equalities legislation with appropriate protections for freedom of speech.

Our study has drawn some tentative conclusions but we urge the need for further research into (a) the way in which the provisions we have identified here have been interpreted by the relevant press councils; and (b) how these codes intersect with any relevant legal provisions in these countries. In the absence of such empirical research, it is not possible to conclude what impact these provisions might have in practice, whether any of them would achieve Leveson's objective, or whether this objective is even possible.

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Brigit Morris

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- has considered several cases concerning the publication of material including hate speech: *Honsik v Austria* (1995) ECHR 55; *Pavel Ivanov v Russia* (2007) ECHR (App no 35222/04); *Jersild v Denmark* (1994) ECHR (20 October). For a detailed overview of statute and case law in this area see, eg Eric Barendt *Freedom of Speech*, (2nd edn, Oxford University Press 2007).
- 21 Council of Europe, Resolution 1003 on the ethics of journalism (1993), [33]: accessed <http://consiluldepresa.md/fileadmin/fisiere/documente/RESOLUTION_1003_APCE.pdf> 1 March 2016 > accessed 30 March 2016.
 - 22 Council of Europe, Recommendation CM/rec (2011) 7 of the Committee of Ministers to member states on a new notion of media (Adopted by the Committee of Ministers on 21 September 2011 at the 112st meeting of the Ministers' Deputies), [84]. <<https://wcd.coe.int/ViewDoc.jsp?id=1835645>> accessed 1 March 2016.
 - 23 Leveson Inquiry, (n 3), Part F, [3.28].
 - 24 Ibid, Recommendation 8.
 - 25 Ibid, Recommendation 11.
 - 26 Ibid, Part K, [2.5].
 - 27 Ibid, Recommendation 38.
 - 28 Royal Charter on Self-Regulation of the Press, sched 2, cl 4.
 - 29 Leveson Inquiry, (n 3), Part K, [4.23].
 - 30 Equality Act 2010 (Eng).
 - 31 Leveson Inquiry, Public Hearings, Ms Anna Van Heeswijk, 24 January 2011.
 - 32 The OfCom Broadcasting Code, updated July 2015. Available at: <<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>> accessed 30 March 2015.
 - 33 Reporters Sans Frontieres (2015) *World Press Freedom Index 2015*: <<http://index.rsf.org/#/>> accessed 1 March 2016. Reporters Sans Frontieres is an international non-profit organisation that has consultative status with the United Nations and UNESCO. The Index tracks levels of violence and intimidation experienced by journalists in 180 nations. It is based on a qualitative questionnaire disseminated to accredited journalists and media organisations, as well as quantitative research from RSF's monitoring into levels of violence and harassment experienced by journalists. The UK is ranked 34th out of 179 countries in the Index.
 - 34 The press councils are as follows (in order of their ranking in the Index): 1. Finland; 2. Norway; 3. Denmark; 4. Netherlands; 5. Sweden; 7. Austria; 10. Estonia; 11. Ireland; 12. Germany; 13. Czech Republic; 14. Slovakia; 15. Belgium; 18. Poland; 19. Luxembourg; 20. Switzerland; 21. Iceland; 24. Cyprus; 26. Portugal; 28. Latvia; 31. Lithuania; 33. Spain. Liechtenstein (ranked 27) does not appear to have a press council. The codes are available at <<https://accountablejournalism.org/ethics-codes>> accessed 1 March 2016.
 - 35 Russia is ranked 152, Turkey 149 and Hungary 65 on the Index.
 - 36 Helen Anthony, Mike Harris, Sashy Nathan and Padraig Ready, *Leveson's Illiberal Legacy* (89 Up, 2014) <http://www.89up.org/sites/default/files/FREEDOM_OF_PRESS_2.4.pdf> accessed 1 March 2016.

- 37 Lara Fielden *Regulating the Press: A Comparative Study of International Press Councils*, (Reuters Institute for the Study of Journalism, University of Oxford, 2012).
- 38 Ibid, [5.2].
- 39 Ibid, [5.2].
- 40 Yehiel Limor and Itai Himelboim, 'Journalism and Moonlighting: An International Comparison of 242 Codes of Ethics' [2006] *Journal of Mass Media Ethics*, 21:4, 265. 'Despite growing interest in and concern with the study of ethics in general and journalistic ethics in particular, we note a distinct lack of international comparative studies on this topic': 270.
- 41 For more on this point, see, Tom Cooper, 'Comparative International Media Ethics' [1990] *Journal of Mass Media Ethics*, 5:1, 8.
- 42 Tiina Laitila, 'Journalistic Codes in Europe' [1995] *European Journal of Communication*, 10:4, 527. See also, Kai Hafez 'Journalism ethics revised: A comparison of ethics codes in Europe, North Africa, the Middle East and Muslim Asia' [2002] *Political Communication*, 19, 225.
- 43 Tiina Laitila, 'Journalistic Codes in Europe' [1995] *European Journal of Communication*, 10:4, 527.
- 44 Spain's Deontological Code for the Journalistic Profession, cl 7(a)-(b).
- 45 Code of Ethics of the Slovak Syndicate of Journalists, cl vi.
- 46 Journalists' Code of Ethics of the Syndicate of Journalists of the Czech Republic, cl 3.
- 47 Leveson Inquiry, Public Hearing, Mr Timothy Toulmin, 30 January 2012.
- 48 Finland's Council for Mass Media's *Guidelines for Journalists*, [26].
- 49 Code of Ethics of the Norwegian Press Association, [4.3].
- 50 Code of Conduct for the Danish Press, cl 4 (only in the context of court reporting).
- 51 Guidelines from the Netherlands' Press Council, [1.6].
- 52 Swedish Code of Ethics for the Press, Radio and Television, cl 10.
- 53 Code of Ethics for the Estonian Press Council, cl 4.3.
- 54 Latvia's Code of Ethics, art 5.2.
- 55 Code of Ethics of Lithuanian Journalists and Publishers, art 54.
- 56 Journalists' Code of Practice of Cyprus, art 12.
- 57 Journalists' Code of Ethics of Portugal, cl 8.
- 58 Code of Ethics for the Austrian Press, issued by the Austrian Press Council, art 5.
- 59 German Press Code, s 10.
- 60 Poland's Code of Ethics, cl v.
- 61 Code of Practice for Newspapers and Periodicals, Press Council of Ireland, principle 8.
- 62 Belgium's Code of Journalistic Principles, art 5.
- 63 cf Karl Popper, *Open Society and its Enemies* (first published 1945, Routledge 1995) vol 1, p 226: 'We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant.'

Notes

- 1 Leveson Inquiry, An Inquiry into the Culture, Practices and Ethics of the Press 2011 (Leveson Part K, [2.5]).
- 2 Leveson Inquiry, Public Hearings, Ms Michelle Stanistreet, 16 November 2011; Ms Anna Van Heeswijk, 24 January 2011. <<http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/hearings/>> accessed 30 March 2016.
- 3 Ibid, Mr Stephen Abell, 30 January 2012; ibid, Lord Hunt of Wirral, 10 July 2012.
- 4 Ibid, George Osborne, 11 June 2012.
- 5 Leveson Inquiry, Part K, [2.5].
- 6 National Archives, House of Commons address by the Prime Minister, David Cameron, 'PM statement on phone hacking', Wednesday 13 July 2011 <<http://webarchive.nationalarchives.gov.uk/20130109092234/http://www.number10.gov.uk/news/pm-statement-on-phone-hacking/>> accessed 30 March 2016.
- 7 See the scope of the Phone Hacking Inquiry Draft Terms of Reference, <<https://www.gov.uk/government/news/phone-hacking-inquiry-draft-terms-of-reference>> accessed 30 March 2016.
- 8 Leveson Inquiry, Part K, [2.5].
- 9 Ibid, [2.26].
- 10 Leveson Inquiry, Public Hearings, Ms Michelle Stanistreet, 16 November 2011.
- 11 Ibid, Mr Inayat Bunglawala, 24 January 2011.
- 12 Ibid, Ms Anna Van Heeswijk, 24 January 2011.
- 13 Ibid, Professor Jennifer Hornsby, 16 July 2011.
- 14 Ibid, Mr Inayat Bunglawala, 24 January 2011.
- 15 Ibid, Lord Hunt of Wirral and Lord Justice Leveson, 10 July 2012.
- 16 Ibid, Mr Stephen Abell, 30 January 2012.
- 17 Ibid, Mr George Osborne, 11 June 2012.
- 18 Ibid, Lord Hunt of Wirral and Lord Justice Leveson, 10 July 2012. See also Ronald Dworkin (1978) *Taking Rights Seriously*, (Cambridge, Massachusetts: Harvard University Press).
- 19 *Handyside v The United Kingdom* (App no 5493/72) (ECHR 5, 1976), [49].
- 20 *Erbakan v Turkey* ECHR (6 July 2006), [56]. The European Court of Human Rights

Opening up the courts: the Court of Protection transparency pilot

Julie Doughty and Paul Magrath

The Court of Protection in England and Wales (CoP) is invariably described by journalists as ‘secretive’ and ‘sinister’. This arises from the tradition that most of its hearings are held in private. Notable examples include newspaper headlines of a woman ‘jailed in secret’ in 2013 and more recent cases which we outline in this article.¹ In an attempt to counter these accusations, the President of the Family Division and the Court of Protection, Sir James Munby, issued new practice guidance to judges in early 2014, with an announcement that he was determined to take steps to improve transparency in both family proceedings and in the Court of Protection.² He wanted more judgments to be published routinely on a freely accessible website, BAILII.³ Two years later, a radical pilot scheme began in the CoP, under which most hearings would be open to the general public, including the media.⁴

This article examines the rationale for transparency in the CoP, through exploring the complexity of finding the right balance between private and public interests. It first outlines the legal position and the specialist nature of the CoP jurisdiction, with its inherent tension between protecting vulnerable people and presenting a confident public face to the sceptical media. It then discusses some case studies of media reporting on the CoP which illustrate this tension. We then examine the case for transparency as this relates to concepts of secrecy, privacy and openness. The potential for the pilot to achieve transparency is analysed, drawing on views expressed at a roundtable discussion in September 2014, which one of the authors was involved in organising, and on recent practical experience, by the other author, of attending hearings under the pilot. Our aim is to contribute in a positive way to debate on the nature of trust and transparency in our public institutions.

Legislative framework

The CoP was established in 2007 under the Mental Capacity Act 2005 (MCA) to adjudicate on matters relating to mental capacity, best interests, advance decisions on refusing treatment, and the use of lasting powers of attorney. The CoP has a range of powers, including jurisdiction to make declarations regarding a person’s mental capacity and best interests; to make orders relating to their welfare or property and affairs; and to appoint a deputy to make decision on their behalf. It deals with cases involving questions of capacity of adults and of young people aged 16 and 17. Since 2009, the CoP has also had powers to make determinations

regarding authorisations issued by supervisory bodies under the deprivation of liberty safeguards (DoLS).⁵ This jurisdiction expanded dramatically after the Supreme Court ruling in *P v Cheshire West; P & Q v Surrey County Council* [2014] UKSC 19, which has contributed to a far greater workload than originally anticipated. The Court has become far busier, involving more people than originally envisaged.⁶

As is self-evident from its name, the CoP has a protective function toward the people within its jurisdiction. This does not, however, deny them, as individuals, rights to participate in decisions made about them. They may have capacity to make decisions about some matters and not others. A common media catchphrase, that the CoP ‘deals with sick and vulnerable people’, is seen as careless and inaccurate shorthand by some lawyers.⁷

The origins of this protective function (and that of the Family Court) lie in the concept of *parens patriae*, as expressed by Lord Shaw of Dunfermline, early in the 20th century, in *Scott v Scott*:

*The three exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of justice are, first, in suits affecting wards; secondly, in lunacy proceedings; and, thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention — trade secrets — is of the essence of the cause. The first two of these cases ... depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as parens patriae. The affairs are truly private affairs; the transactions are transactions truly intra familiam; and it has long been recognized that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs.*⁸

The *parens patriae* function of the crown for incapacitated adults no longer exists.⁹ As recast for the modern age, in *A v Independent News & Media Ltd and others* [2010] EWCA 343, Lord Judge emphasised that the CoP is making decisions that would be private and autonomous, were it not for the lack of legal capacity of the individual.

In his judgment in *Scott*, Lord Shaw cites the familiar words attributed to Bentham, to emphasise the philosophical and utilitarian values of the principle of open justice:

“In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.” ‘Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.’ ‘The security of securities is publicity.’¹⁰

However, there is now a range of reporting restrictions on family and CoP cases, including section 12 Administration of Justice Act 1960 (AJA). As amended to include the MCA in sub-section (1) (b), section 12 states that the publication of information relating to proceedings before any court sitting in private is contempt of court in children and adoption cases and where the proceedings are brought under the MCA. The operation of this section is regulated by court rules and practice directions about which type of hearings are to be held in private. Originally, family proceedings were subject to the Family Procedure Rules 1991 issued under the Children Act 1989. These have been replaced by the Family Proceedings Rules 2010, the rules on access to private hearings having been twice amended, in 2005 and 2009 respectively.¹¹

Paradoxically, it was at about the same time that the family courts’ rules were being relaxed ten years ago, that the CoP Rules were being drafted. It is surprising that complaints about ‘secret’ family courts were not seen as having any relevance to the new Court. The political landscape was different to today, and media interest in family justice centred either on fathers’ rights or the use of medical evidence in care proceedings.¹²

The Department for Constitutional Affairs consulted on draft court rules for the CoP in 2006. It was initially proposed that ‘hearings ... should be in public but that a hearing, or any part of it, may be held in private if the court considers any of the circumstances set out at draft Rule 45(3) are met’.¹³ These circumstances included cases where publicity would defeat the object of the hearing; where confidential information (including information relating to personal financial matters) was involved and publication would damage that confidentiality; or privacy was necessary to protect the interests of the person involved. There were 39 responses to this consultation; none of these seem to have come from representatives of the media, but they were not specifically invited to respond, unlike other agencies.¹⁴ Of the 27 respondents who commented on the publicity questions, 12 supported the proposal that there should be a presumption that hearings of the CoP should be held in public and 11 opposed it. Even among those who favoured a starting point of publicity, there was a general view that, in practice, most proceedings would need to be held in private. Among the reported reasons given for favouring privacy were that respondents felt that it would be less daunting for vulnerable individuals and their families.¹⁵

Those favouring a starting point that proceedings should be held in private argued that there was insufficient public interest to justify hearings in public. The relevant person’s interests of confidentiality and privacy were best served by private hearings; the process could be distressing for the person and their family and if the person had some capacity they would not want their financial information to be in the public domain. Individuals concerned had already suffered the indignity of losing capacity and having to live by the decisions of others and the presumption should, therefore, be that hearings should be in private, unless the court considered it in the interests of public policy to be otherwise.

Despite the ambivalence of these responses, the government

changed its position and the 2007 rules start from a presumption that hearings will be held in private, but with powers to order that a hearing may be held in public. Rule 90 provides the general rule is that a hearing is to be held in private. There are powers under rule 91 to authorise the publication of information about those private proceedings, or to restrict the publication of any identifying information or other information. The CoP may make an order under rule 92 for a hearing to be in public, but it may exclude from that hearing any person or class of person. When a hearing is in public, the automatic restrictions of section 12 AJA do not apply, but the CoP may make an order under rule 92 imposing reporting restrictions. However, this presumption of a private hearing was reversed where the application related to serious medical treatment, where hearings would normally be held in public under rule 92.¹⁶

It would appear that the 2007 rules envisaged the necessity to protect privacy rights under Article 8 ECHR as outweighing the rights of the media to freedom of expression under Article 10. However, in *A Healthcare NHS Trust v P & Q* [2015] EWCOP 15, Newton J cited *Campbell*, ‘in which the starting point is presumptive parity in that neither Article has precedence over or trumps the other.’ [37]. Article 6 (the right to a fair trial) is also engaged, although the right to a public hearing can be limited. Moriarty observes that restrictions on reporting in the cases of children can as easily be ascribed to the smooth administration of justice as to protection of individuals.¹⁷ Although the argument is that private proceedings will encourage candid evidence, a concern here is that journalists may see reporting restrictions as being imposed for the convenience of those working in the system, rather than the administration of justice in the sense of achieving the right result.

The position dramatically changed on 29 January 2016 under the pilot, planned to run for six months. Now, the court will ordinarily make an order under rule 92(1)(a) that attended hearings will be in public and, in the same order, impose restrictions under rule 92(2) in relation to the publication of information, in order to anonymise the person concerned.¹⁸ For the duration of the pilot, therefore, most hearings, not just serious medical treatment cases, are held in open court. There was no public or professional consultation before the pilot was announced in November 2015, as far as the authors are aware.

Some background to the issues will now be explained, including some examples of media coverage and a discussion of the arguments for more transparency.

Media interest in the Court of Protection

There is a dearth of evidence about how courts generally are represented by the UK press. Moran’s research suggests that press reporting of routine court proceedings and about the judicial function is rare, and is dominated by criminal trials.¹⁹ This is perhaps inevitable, given the economic pressures on the media that have led to fewer journalists working in the courts.²⁰ It has been noted that after an initial flurry in April 2009, when the family courts’ rules were amended to allow journalists to attend, very few did so. It was impractical to send reporters to local courts in the hope of a newsworthy case. In 2014, media representatives highlighted ongoing difficulties in being alert to family and CoP judgments where it would be in the public interest to report.²¹

Media coverage has tended to be negative. The CoP has been described by some journalists as ‘secret’ and ‘sinister’.²² Narratives are constructed about individuals struggling against the monolith

of health and social services. This can be illustrated in the reporting of the few cases that have attracted media attention: Steven Neary; the ‘Italian caesarean’ case; Manuela Sykes; Re G; and the ‘woman who sparkled’.

London Borough of Hillingdon v Neary [2011] EWHC 413 (Fam); London Borough of Hillingdon v Neary [2011] EWHC 1377 (COP)

Steven Neary is a young man with autism and learning disabilities. His father, Mark Neary, is his carer and in 2009 had arranged for Steven to have a few days in respite care because he (Mark) was unwell. The body responsible for the care, London Borough of Hillingdon, refused to let Steven return. He was very unhappy about living away from home. Mark Neary did not know of a legal remedy and began an internet campaign - ‘Get Steven home’. This came to the attention of the press and broadcast media. A year after Steven had left home, Mostyn J terminated the deprivation of liberty in the CoP, and Steven has lived with his father ever since.

In February 2011, Peter Jackson J heard applications by five national media organisations to attend and report on proceedings, and to identify Steven and Mark Neary. The matter at issue was whether Hillingdon had acted unlawfully. Peter Jackson J considered rules 90-92, concluding that the case raised matters of public interest, details were already in the public domain, there was no evidence that publicity would cause detriment or distress to Steven, and that irresponsible journalistic practices were unlikely. In June 2011, Peter Jackson J held that Hillingdon had acted unlawfully.

The story was featured in most national newspapers and several local papers (across the UK). Typical headlines paid tribute to the strength of Mark Neary’s determination to be reunited with Steven and ‘save’ him from institutional care, but Mark Neary thanked the Court and the press. For example, in a *Times* article headlined: ‘Press interest saved Steven’

Speaking after yesterday’s ruling, Mark Neary said: ‘We would not be here today if it had not been for the press involvement. He added that he had first decided to go public ‘out of desperation’ while trying to find legal representation, but said: ‘Hillingdon’s plan was to move Steven under section to a hospital in Essex.

If the press hadn’t got involved, he’d be there now.’²³

Mark Neary has since been featured in both mainstream and social media to help raise public awareness of the DoLS and the role of the CoP in providing a review.²⁴

Re AA (Compulsorily Detained Patient: Elective Caesarean) [2012] EWHC 4378 (COP); Re P (A Child) (Care and Placement: Child’s Welfare) County Court (Chelmsford) [2014] 1 FCR 636; [2014] Fam Law 283; Re P (A Child) 2013 EWHC B14 (Fam)

In August 2012, Mostyn J heard an application in the CoP by a NHS Trust for an order that it would be in the best interests of a seriously mentally incapacitated pregnant woman to have her baby delivered by caesarean section. The mother was an Italian national visiting the UK, who had been detained under the Mental Health Act 1983. After the birth, the local authority where she had been staying applied for a care order in the family courts regarding the baby, who was made subject to a care order

and placement for adoption in February 2013. (The mother had returned to Italy and none of the extended family was able to care for the child.) Neither judgment was publicly available at the time but were both later published in December 2013, following a story in the *Daily Telegraph* newspaper, which falsely stated that social workers had themselves arranged the operation in order to remove the baby.²⁵

This sensational *Daily Telegraph* story rapidly spread world-wide in the four days between the date it was published and the date the judgments were published on the Judiciary website. Essex County Council applied for a reporting restriction order to protect the child, which was heard by the President on 13 December. In his judgment, he described much of the press reporting as strident and inaccurate.

The President went on to observe that when the story first ‘broke’, none of the relevant information was in the public domain. He therefore questioned whether the family justice system could blame the media for its inaccurate reporting. He added:

This case must surely stand as final, stark and irrefutable demonstration of the pressing need for radical changes in the way in which both the family courts and the Court of Protection approach what for shorthand I will refer to as transparency. We simply cannot go on as hitherto. Many more judgments must be published. And, as this case so very clearly demonstrates, that applies not merely to the judgments of High Court Judges; it applies also to the judgments of Circuit Judges.²⁶

Within a few weeks, the President had issued his practice guidance to that effect.²⁷

Not everyone was as forgiving of the questionable standard of the press reporting about the case. There was no sign that the *Telegraph* had made any attempt to check the facts, and the delay before the judgments emerged was frustrating for legal commentators (and no doubt others) who know that local authorities have no such authority with regard to medical treatment.²⁸

Westminster City Council v Sykes (2014) 17 CCW Rep 139

Manuela Sykes was a political activist who developed dementia and was moved to a care home under a DoLS authorisation by Westminster City Council. She said she was miserable there and that she could be cared for at home. Westminster therefore applied for a review under the DoLS. DJ Eldergill heard the application in private but released a judgment naming Ms Sykes, with restrictions in place regarding the identity of her family and carers. This case was listed only a few weeks after the January 2014 practice guidance was issued by the President; the Press Association had been given prior notification by the court and attended to apply for permission to publish on what they claimed was a matter of public interest. The judge agreed, and noted that Ms Sykes had expressed a wish to be named (through her litigation friend who knew her well).

DJ Eldergill examined the publicity aspect at length but said:

MS’s personality is a very critical consideration. Some people are very private; she is very public. She has always been a campaigner and a fighter. She has a strong will to change the world, to influence others and to draw their attention to the plight of people, including those with dementia, that she

believes need and deserve more care. She would wish her life to end with a bang rather than a whimper... She has never lacked courage or a willingness to place herself at the centre of public debate and attention.[40]

Clarifying that Ms Sykes, the local authority and the expert witness could all be identified, he added:

The press, parties and public are of course free to criticise and discuss the court’s judgment and the approach taken by it.[43]

There were balanced reports in many national newspapers, explaining that there were no concerns about the quality of care, just that Ms Sykes preferred to be at home, and that Westminster had genuine concerns about how she would cope. However, despite the judge’s open approach, a front-page article in the *Independent* was headlined: ‘89-year-old suffering from dementia wins the rare right to have her identity reported in a case in the secrecy-shrouded Court of Protection; Manuela Sykes wins right to move out of care home and return to her home of 60 years.’²⁹

A London Borough v G (by her litigation friend the Official Solicitor), C and F [2014] EWHC 485 (COP); Redbridge LBC v G [2014] EWHC 959 (COP); Re G (An Adult), Redbridge LBC v G [2014] EWCOP 1361; Redbridge LBC v G [2014] EWCOP 17; Re G (An Adult) (Costs) EWCA Civ 446

This series of cases included applications by newspapers for access to interview Mrs G, who was 94 years of age and frail. She lived in her own home with the second and third defendants (C and F), who had recently moved in. The local authority was trying to investigate numerous reports that she was being manipulated and intimidated by C and F. The issue for the court was whether G lacked capacity to make decisions about C and F living in her home and, if she did, whether that was because of mental impairment under the MCA, or whether she was a vulnerable adult who had been deprived of capacity by constraint, coercion or undue influence and was therefore entitled to the protection of the court under its inherent jurisdiction.

In February 2014, Russell J stated that, from the history of the case and the repeated complaints, Redbridge Council had had no alternative but to try to see G alone; anything else would have been a dereliction of its duty to her. She concluded that Mrs G did lack capacity and that investigation into her best interests was required by Redbridge. An article in the *Telegraph* was drawn to the judge’s attention; this accused Redbridge of trying to take Mrs G’s money and evict her and ‘her niece’ from their home.³⁰ The proceedings were held in open court, with members of the public and the media present throughout. The judge restricted the publication of the names of the parties. Because Mrs G had repeatedly complained of the proceedings intruding into her life, the judge held that future hearings should be held in private.

Members of the press were allowed to attend the subsequent private hearings. Cobb J held that, pending a medical assessment, it was not in Mrs G’s best interests to engage with the media because she had expressed ambivalent feelings about this. The *Daily Mail* published a story about this being a gagging order that might lead to Mrs G herself being imprisoned.³¹ This was misleading; the CoP has previously refused to hold parties who lacked litigation capacity in contempt of court for breaching reporting restrictions.³²

At the final welfare hearing, when the full medical assessment was

available, Russell J concluded that Mrs G lacked mental capacity with regard to C and F although she was frightened of them, and ordered that it was not in her best interests to live with them; that she remain in her home, with support from Redbridge, and be re-integrated into her local church. From the judgments, the newspapers emerge as having been far readier to accept C and F’s version of events than undertake a rational assessment of the roles of the CoP and the council.

King’s College Hospital NHS Foundation Trust v C [2015] EWCOP 80; V v Associated Newspapers and the Press Association [2015] EWCOP 83

The tone of media coverage about ‘the woman who sparkled’ might have given pause to advocates of the pilot, which had recently been announced when her case was heard in November 2015. Indeed, in the recently published judgment (in April 2016) on extending anonymity for C subsequent to her death, Mr Justice Charles, a champion of the pilot, is highly critical of the behaviour of some journalists.³³ The issue for the CoP was whether C had the capacity to decide whether or not to consent to the life-saving treatment of kidney dialysis that her doctors wished to give her following her attempted suicide. C had refused the treatment and was supported in that decision by her daughters. Macdonald J observed:

‘C is, as all who know her and C herself appears to agree, a person who seeks to live life entirely, and unapologetically on her own terms; that life revolving largely around her looks, men, material possessions and ‘living the high life’ ... it is clear that during her life C has placed a significant premium on youth and beauty and on living a life that, in C’s words, ‘sparkles’.[8]

He concluded that C had the requisite mental capacity to refuse the treatment, however illogical this might appear to someone who did not know her. He set out evidence of C’s entitlement to make her own decision, based ‘her own personality and system of values and without conforming to society’s expectation of what constitutes the ‘normal’ decision...’, thereby upholding C’s autonomy but with (no doubt unforeseen) grossly negative ensuing publicity. C was portrayed throughout the press as a vain and selfish gold digger, with suggestions that this was the judge’s view of her.³⁴ Although it seems C was not a public figure, there was pressure from the media to name her, and photographs were published which may well have made her identifiable, although her face was pixelated. This being a serious medical treatment case, it had been held in open court with the usual reporting restriction made against C being identified. C died at the end of November 2015 and the *Daily Mail* applied to have the order lifted. The judge hearing that application, Theis J, noted that C’s family might not have been as candid in their evidence, had they known the publicity the case would receive, and that C’s youngest daughter, only 15, would be vulnerable if she was identified. The reporting restriction was extended. The most recent judgment, by Charles J, contains a rigorous but succinct analysis of the competing Article 8 and 10 interests and reject the contention on behalf of the press that there is public interest in naming C. Sadly, the judgment describes relentless harassment of the family by some journalists.

Complaints made by practitioners about the media reporting of Macdonald J’s judgment case included widespread inaccurate references to the case being about ‘a right to die’. An overview of the debates around the case might well assist with public legal education.³⁵ However, Charles J criticises the applicants for being ‘prurient’ and ignoring the serious issues.

Of these five case studies, arguably only Neary and Sykes were reported in a way that promoted the work of the CoP, as the architects of the transparency pilot envisage as one of its primary objectives.³⁶

The case for transparency

Transparency in the Family Court

Accusations of ‘secret’ family courts are not new; they are intertwined with allegations of gender bias propagated by the fathers’ rights movement since the early 1990s.³⁷ It became apparent that the combination of section 12 AJA and section 97(2) Children Act 1989 (which makes it a criminal offence to publicly identify a child subject to proceedings) made the family courts very tightly restricted. A series of government consultations, responses and statements were issued between 2006 and 2010.³⁸ In July 2008, the *Times* newspaper ran a campaign over successive days, demanding the opening up of secret family courts. In December 2008 it was announced that the court rules would be changed to allow journalists to attend family court hearings.³⁹ This amendment took effect from April 2009.⁴⁰

Attempts to satisfy demands about the family courts have met considerable obstacles. In the week that the rule change was introduced in 2009, the High Court excluded media attendance in a Children Act 1989 dispute between separated parents in relation to a young child of a celebrity father.⁴¹ Expert evidence was presented about the impact of publicity on the child’s welfare and on the confidential relationship between the child and her psychologist.⁴² Sir Mark Potter P observed that media interest in the case rested solely on the identity of the father, and that this fact did not outweigh the damage to the child’s welfare that continued media attention was causing. It is however, a rare case where a child or vulnerable adult has access to this level of independent professional support for their viewpoint.

A public education aspect of the attempted reforms flowing from the Labour government consultations was the establishment of the Family Court Information Pilot, in which judgments in three court areas were anonymised and placed on BAILII between 2009 and 2010. An evaluation of the pilot found that there were practical concerns amongst practitioners about the shortcomings of anonymisation and risks of identification of children. Secondly, the vast amount of material on the website was difficult to navigate even by those familiar with BAILII. No evidence of any press interest in the exercise was found.⁴³

More recently, Brophy and colleagues have responded to the President’s transparency agenda in the family courts with a report on a research study with young people which calls for full consultation and scrutiny by Parliament of any further proposal for reform, instead of important changes in the law emerging as practice guidance. The research participants argue that it is young people who are affected and therefore they should have an opportunity to be listened to.⁴⁴

The transparency agenda was taken up by Sir James Munby personally soon after he was appointed President in 2013. He, his predecessor (Sir Nicholas Wall), and other members of the judiciary have long been consistent in their call for an end to the ‘secret courts’ label which they hoped the routine reporting of cases could show system that functioned well.⁴⁵ However, another point of interest in Brophy’s 2014 report is the observation that what was once envisaged as an ‘educative’ function

whereby the press could explain legal processes to the public, has been displaced by the view that ill-informed criticism ‘expressed in vigorous, outspoken or trenchant terms’ is to be expected, because judges do not, and should not, exercise editorial control.⁴⁶

Transparency in the CoP

A roundtable discussion held in September 2014 in London on the theme of transparency in the CoP was attended by 23 participants with an interest in the CoP including: members of the judiciary; lawyers; journalists; civil servants; and academics. All those attending believed that increased transparency could bring benefits. The reasons put forward included: increasing public understanding of the work of the CoP; protecting against potential miscarriages of justice; promoting public confidence in the CoP; and assisting litigants in person. As one participant commented, any system whereby a person could be deprived of their liberty should in principle be open to scrutiny by the public, through the media. The reciprocal nature of the right to freedom of expression under Article 10 was stressed – the right to receive as well as to transmit information. Although differing views were discussed during the day, there was overall consensus, in contrast to the polarised views expressed at meetings about family courts, as described by Maclean.⁴⁷

Some of those attending the CoP roundtable felt that transparency was a safeguard against potential miscarriages of justice, although no-one had any concerns about any judicial behaviour – in fact it was felt that anyone attending the court would be impressed by the work undertaken by the judges. It was noted however, that the reasoning in judgments about interventions in pregnancy and childbirth had improved since the published judgment in *Re AA*.⁴⁸ The negative publicity that had surrounded this case had resulted in increased awareness of the sensitive issues to be addressed in such situations.

As outlined earlier in this article, the level and tone of media interest in the workings of the CoP is variable. Despite poor reporting about a few cases, the roundtable participants did not express the extent of anxiety that has come up regarding the Family Court.⁴⁹ The strength of young people’s awareness of long-term effects of invasions of their privacy is, rightly, of huge concern. Perhaps the dangers of exposure are just far less in the CoP. *Re AA* was, after all, made scandalous by the *Daily Telegraph* through its association with a baby in family court proceedings, and Mr Booker’s strong antipathy to social workers.

We were reminded at the roundtable that although the two courts are analogous in some ways, they have different client groups and different functions. In *A v Independent News & Media Ltd and others* [2010] EWCA 343, Lord Judge explained that the MCA had introduced a ‘self-contained legislative structure’ [17]. He went on,

The affairs of those who are not incapacitated are, of course, decided and handled privately, usually at home, sometimes with, but usually without confidential professional advice. None of these decisions is the business of anyone other than the individual or individuals who are making them. And that, as we emphasise, represents an entirely simple, and we suggest self-evident aspect of personal autonomy. The responsibility of the Court of Protection arises just because the reduced capacity of the individual requires interference with his or her personal autonomy. [18]

This highlights the crucial point: how can we, the public, know that the individual’s privacy, autonomy and dignity are being maintained by the decision-makers without ourselves interfering in that process? The relationship between secrecy, privacy, openness and transparency is not straightforward.

Secrecy and privacy

Speaking to the Society of Editors in 2013, Sir James Munby, said that the general public views attempts to distinguish between ‘secrecy’ and ‘privacy’ as mere lawyers’ semantics.⁵⁰ However, a right to private life is recognised by the ECHR as a fundamental value, whereas secrecy is a far more emotive description. As ethical philosopher Sisella Bok has explained, the line between personal secrecy and privacy can be hard to define, as both have a place in our autonomy and identity. She distinguishes secrecy in this individual sense from exclusive secrecy of groups or of institutions. In other words, the larger and more powerful the holder(s) of the secret, the more dangerous it is likely to be.⁵¹ This theory supports an argument that the courts should be open and not secretive but also that individuals do not have to be exposed to the public gaze.

The value of privacy has been studied across academic disciplines. Solove’s work provides a helpful overview.⁵² He calls privacy a sweeping concept that includes: freedom of thought; control over one’s body; solitude in one’s home; protection of one’s reputation; control over personal information; freedom from surveillance; and protection from search and interrogation. It has been expressed over the years as ‘the right to be let alone’; limited access to the self; personhood; and intimacy. Clearly, a court system is not itself private, even one which deals with matters that are invariably of a private nature.

The roundtable participants were very conscious of the position of the person at the centre – who had not chosen whether to fight or concede their case – and whose views about what was being shared were probably unknown. Incidents were related about where families had been subject to a ‘media circus’ or identified and ‘doorstepped’ by a journalist. Media participants were troubled by these, and suggested that they may involve inexperienced reporters who were accustomed to dealing with wrongdoers; ‘in the CoP, non-one wears a black hat.’ Some patients later recover capacity and could experience distress at reading about their own experience of childbirth or involuntary treatment in a law report. Privacy issues therefore range from the effect on family and carers, the unknown impact on the person subject to reports, and the basic principle of respecting the personal nature of most of the information. There were some misgivings about the level of detail typical in judgments in a common law jurisdiction.

Openness and transparency

These terms are often used in conjunction, as though they have distinguishable meanings. Sometimes, they are linked without giving alternative meanings, as if to emphasise the same concept through repetition. For example, a report to the European Parliament entitled ‘Openness, transparency and access to documents and information in the European Union’, begins with this sentence: There is an ever-growing demand for openness and transparency in modern societies’ and nowhere differentiates the two concepts.⁵³ Heald concludes that, in general usage, no clear distinction can be drawn. Transparency has become the contemporary term of choice, although he suggests that the description may be directed at different audiences, with ‘openness’ being the preferred term for non-specialist readers.⁵⁴

On the other hand, Birkinshaw perceives a difference between the concepts. Transparency comprises: access to information; conducting affairs in the open or subject to public scrutiny; keeping observable records of official decisions and activities (for later access); providing reasoned decisions and adequate reasons for decisions made by those in power that affect the public or individuals; and making processes of governance and law-making as accessible as possible for ordinary members of the public. He writes: ‘Complexity, disorder, and secrecy are all features that transparency seeks to combat.’⁵⁵ For him, openness goes beyond access to documents to opening up meetings and processes of public bodies. Being open means to concentrate on processes that allow us to see the operations and activities of government at work - subject to necessary exemptions. Larsson distinguishes openness as a characteristic of an organisation while transparency is a method of externally processing the information.⁵⁶ These theories reflect the Habermas line of legitimacy being achieved when the public can access systems through freely available communication processes.⁵⁷

During the roundtable discussions, it was observed that simply ‘opening the court’ and publishing everything without any signposting may well cause confusion and be ignored.⁵⁸ As Heald puts it, transparency requires ‘receptors capable of processing, digesting and using the information available’.⁵⁹ There were mixed feelings at the roundtable about the 2014 practice guidance, and some felt that it gave little real direction. It was doubted that the guidance was (or could be) universally followed. One participant described it as ‘unprincipled and incoherent’. It therefore has to be questioned how much the new ‘openness’ is really making anything ‘transparent’.⁶⁰

Jaconelli identifies three rationales for open justice: the investigatory rationale; the disciplinary rationale; and the confidence rationale.⁶¹ The first of these relates primarily to criminal proceedings where publicity may assist with associated investigations. The second is described by Hanna, writing about family courts, as the ‘scrutiny’ rationale, reflecting the watchdog function fulfilled by reporting from the courts. The third follows from the second: that the public can have confidence in the system if it is being scrutinised. It is this third rationale that Hanna believes underlies the series of attempted reforms between 2004 and 2010. Indeed, one set of documents is entitled ‘Confidence and Confidentiality’.⁶² But even if there is less of a problem about confidence in the CoP than the Family Court, it is an important institution and its workings should be transparent. Perhaps, if the current position is less rancorous than in the Family Court, this might be easier to achieve.

Challenges

The workload of the CoP has been steadily increasing since it was established in 2007, especially in its health and welfare jurisdiction, where the number of welfare orders rose from 14 in 2008 to 400 in 2014.⁶³ The *Cheshire West* judgment⁶⁴ adopted a much more expansive definition of ‘deprivation of liberty’ in the context of care of adults who lack mental capacity than in earlier cases. This has increased the rate of applications to authorise deprivation of liberty in care settings and the workload has increased significantly. The struggle to cope came to a head in March 2016, when the judge in charge of the CoP, Charles J said that the Supreme Court decision ‘... has, in a time of austerity, imposed major and perhaps unforeseen difficulties and burdens on those responsible for providing, authorising and monitoring the placement and care of a wide range of vulnerable people.’⁶⁵

One aspect of the problem was that the rules regarding representation of P's interests were not being followed.⁶⁶ He went on to invite the Secretary of State for Health, Jeremy Hunt, and the Secret of State for Justice, Michael Gove, to explain how this was to be remedied. At the time of writing, this remains an impasse. In this context, the complexities of publicising judgments may not be the best use of scarce resources. On the other hand, the more people's lives are touched by the court, the more the need for public understanding.

The President's practice guidance lists two separate categories of judgment that, respectively, *must* ordinarily be published and *may* be published on BAILII. The first category lists nine types of case, including orders about the giving or withholding of medical treatment; applications about the DoLS; applications about a person moving in or out of an institution; applications about consent to marriage or to have sexual relations; and applications for orders to restrict publication. The second category is any judgment where a party or member of the press has asked for permission that the judgment be published and the judge agrees that it should.

BAILII is a charity, supported by donations. It receives no government funding. In the second category, the applicant will pay the cost of the anonymised transcription. In 2014 and 2015, there were nearly 80 CoP judgments published on BAILII each year, compared to about 25 in each of the preceding years. Clearly, the practice guidance has been effective in bringing far more cases into the public arena (whether or not they are actually read). However, anonymising and sending the judgments is an extra task for the courts to undertake, with no additional resources being provided. Furthermore, it still seems that when a case does hit the headlines, the newspaper rarely links to the original judgment.⁶⁷

A number of participants at the 2104 roundtable knew of situations where reporting restrictions had not prevented jigsaw identification. There were instances where a great deal of the facts had to be omitted from the judgment to be safe, and even where journalists had decided against reporting because a family would have been recognised by local readers. The roundtable also identified some shortcomings with arrangements for media access and reporting. The rationale for open court for serious medical cases and a closed court for others seemed illogical. Individual judges took varying approaches. One journalist described one judge as helpful in alerting the media, letting them attend, and discussing with them what might best be published.

The need to apply formally to attend hearings was expensive, creating a disincentive to smaller media organisations. The roundtable report recommended that practice be aligned with that in the Family Court.⁶⁸ In particular, there were problems in the media being aware that a case of potential public interest was listed for hearing. Those attending were unsure of the legal position, should a legal representative wish to notify the media about a case. It was not at all clear in what circumstances the media would be notified of an interesting case, unless a family member alerted someone.

Even where the media did attend open court, the situation regarding reporting restrictions was unsatisfactory. Sometimes notice of an application for reporting restrictions arrived very late, even after the case had been heard. The way cases are listed gave little clue as to which might be in the public interest to attend. Often no explanation accompanied the application, and it seems that usually only the application is served, not notice of what order was actually made.

The roundtable report recommended that data be collected on the operation of the new practice guidance; which cases were being published and whether these were attracting any media attention; and what effect this was having on court users and those working within the system. However, the idea of reversing the position to hold all hearings in open court did not arise. It is hoped that the practical transparency issues identified by the roundtable participants will be addressed through the new scheme and that an eventual evaluation of the pilot by the Ministry of Justice will contribute to the academic, professional and public debate.

Attending under the pilot scheme

One of the authors has taken the opportunity to attend.⁶⁹ The CoP sits in a number of locations with the main one on the fifth floor of a building shared with the Central Family Court in High Holborn. Lists of hearings are posted on a noticeboard in the lobby, and on the Justice website.⁷⁰ Some hearings in the list are marked 'Not open to the public' but others, which have been designated as such, are listed as 'Public with reporting restrictions'. A sample case, attended in February 2016, was listed as 'AM -v- UH and EO and TH 1281945401 - Where UH should live - HEARING IN PUBLIC.'

Some ground rules have been established for the purposes of the pilot scheme. Anyone attending a hearing must first sign in at the court's reception desk. They will be given a copy of the court order that set the case down for hearing in public, identifying the parties involved with initials (actually random letters of the alphabet bearing no relation to their actual names) and setting out the reporting restrictions, together with a bold warning that anyone breaching them 'may be found guilty of contempt of court and may be sent to prison, fined or have their assets seized'. They then need to sign a form, recording the fact that they have received the order, and giving their name, address and the capacity in which they are attending the hearing. Press reporters must follow the same procedure.

Inside the court, members of the public will be asked to sit at the back. Before the case begins, the judge checks everyone on the list, asking all those present, including the advocates and parties, to identify themselves and to confirm in what capacity they are attending. It is in this respect quite unlike a public hearing in open court, when only the advocates speak, unless there are litigants in person. No one normally asks who people in the press bench or the public gallery are. The difference cuts both ways. It makes the hearing itself less formal, more intimate even, and certainly less adversarial, therefore less intimidating for the non-lawyers present, which may include family members. (In this respect, it may not be different from non-public hearings in the CoP and Family Court but, as an outsider, one wouldn't know this.)

On the other hand, the fact that one is asked to sign in and accept delivery of a court order warning of the consequences of any breach of reporting restrictions is a more formal procedure than for attending most hearings in public, and might either deter those casually interested in attending (such as tourists, who often pop into the main law courts in the Strand to see them in action) or otherwise have a slightly chilling effect on a lay person wishing to research or write about the hearing.

The first sample case concerned the care of a 67-year-old woman who was blind and had symptoms of dementia. Her family and friends believed she was not being properly looked after at a local

authority care home. There were complaints of neglect on one side and about interference with the management of the home on the other. Although this was only a directions hearing, the judge allowed the woman's son and daughter, and a friend who frequently visited her, to air some of their grievances. This was followed by discussions with the advocates about a round table meeting to be chaired by the Official Solicitor, aimed at achieving a resolution by mediation, failing which it would return to the judge for a full evidence hearing and decision.

What did the parties think about the fact that the hearing was (for practical purposes) in open court? The pilot scheme might have taken some parties by surprise, and they might not want their cases to proceed had they been aware that the hearing could be attended by members of the public and might be reported (subject to restrictions) by the press. Not so on this occasion. Because everyone had been introduced at the beginning of the hearing, the parties knew there were other people attending, including a press reporter. They did not seem to have been intimidated: indeed, the family members seemed anxious to know that their story had been heard, that they had had their 'day in court' and there was public scrutiny of their complaints about the care homes and local authority.

It would be necessary to canvass the views of a representative sample of parties or family members to ascertain whether the balance of feeling was in favour of open court exposure, scrutiny and vindication, or against what might be seen as unnecessary intrusion into the private lives of vulnerable or incapacitated parties.

Finding out about the case

In terms of reporting the case, particularly for someone who is not an accredited media representative, one of the difficulties is finding out what the case is about and what exactly one can say about it. The order which one is given (and must sign for) is categorical about not identifying some of the parties, but it does not say much about who they are or what they are asking for in the case.

It only became clear on a second visit to the court that it was possible to ask for something called the position statements, which should be filed by the parties in advance of the hearing, setting out their view of the facts and how the court should apply the law. Coming into court and hearing a case for the first time, it can be baffling knowing what is going on and what the background facts are. So being able to read these statements would make a big difference. But they have to be specifically asked for, and there is nothing in the order, or in the information given to non-parties, to suggest that they have any such right.

One solution might be for the parties to be required to file extra copies of these position statements with the court, so that they can be distributed to any media representatives or members of the public attending a hearing. The burden of providing a few extra photocopies surely cannot be excessive and, if necessary, the court staff could provide extra copies, to go with the court orders which they already distribute to anyone attending the hearing.

An alternative solution would be for that court order, which already sets out the reporting restrictions and briefly identifies the issues to be resolved, itself to include a brief statement of the background to the case. Given that a judge will eventually have to write a judgment setting out this information, the burden on judicial time would not be greatly increased, and it might even

save time overall. By way of example, here is the opening of a published judgment by District Judge Eldergill, given in an earlier case published on BAILII, *PB v RB & anor* [2016] EWCOP 12:

2. *The case concerns the welfare of RB, a 74 year old woman who has dementia. At the present time she lives in a residential care home referred to as E Care Home.*
3. *RB has one son (PB) and three daughters (CL, DB and LA).*
4. *The primary issue is whether it is in RB's best interests to remain at E Care Home or to return to her home at R Close.*
5. *A third possibility, that she move to extra care supported housing at R Court, is no longer an option because it is unlikely to have a vacancy for some considerable time. R Court could potentially have provided RB with a two-bedroom flat with 24 hour support.*

Something like this would provide anyone coming into court – as it provides those reading the beginning of this judgment – with an outline of what the case is about.

Conclusion

Because this is a pilot scheme, we hope that there is already a feedback loop in operation. It was noticeable on the second visit to the court, a month or so later, that the name of the local authority, which had been anonymised in the first case, was set out in full in this court order. That change may have been in response to media reporting of cases, including the account of one of the present authors in a blog post.⁷¹

Informal discussion with court staff on the second visit suggested that the level of public attendance at hearings under the pilot scheme during its first two months had not been significant. Only one court reporter (from the Press Association) made anything like regular visits and, apart from him, the number of members of the public attending did not reach double figures. That should not matter particularly. The justification for the pilot scheme, and for greater transparency in general, is not about numbers. The principle of open justice is based on the possibility of scrutiny, not proof of its actuality. The fact that, to date, the court has held many hearings in public and there have not been any major misreporting disasters is arguably an endorsement. The vital piece in the picture is whether P and their families have a sense of intrusion.

The five case studies we set out above show that some journalists do try to attend and/or report on the CoP if they are alerted to a case of interest. Perhaps transparency can be achieved through developing public awareness that attendance can be routine and unremarkable, even if it is not common. Even if only high profile and atypical cases continue to be publicised, with appropriate reporting restrictions, no longer can anyone simply claim that the CoP is a secret and sinister court.

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Data protection in media litigation

Jennifer Agate and Owen O'Rorke

Summary

With the final text agreed and not even Brexit likely to stop it taking effect in summer 2018, the General Data Protection Regulation is looming large on the agenda for all practitioners. This is particularly so in the field of media litigation, with recent case law establishing that not only can data protection be brought alongside defamation claims, as it already has been in alongside privacy claims, but it can be used to claim damages for distress.

In this article we discuss the increasing prevalence of data protection claims in media complaints and litigation and how it fits around the more traditional routes in defamation and misuse of private information.

Background: data protection and the tort of misuse of private information

The synergy between misuse of private information and data protection law is a particularly strong one, with the two being used in tandem since misuse of private information was first developing from the law of confidence.

Misuse of private information is based on the principle under article 8 of the Human Rights Act that everyone has the right to respect for his or her private and family life. Where a reasonable expectation of privacy exists in information, a balancing act must be carried out between that privacy right and the publisher's article 10 right of freedom of expression. Where the balance falls in favour of privacy, publication can be restrained.

Similarly, the Data Protection Act 1998 (DPA) imposes obligations on data controllers to obtain, hold and process personal data fairly and lawfully, and – among other requirements – to process personal data in accordance with the rights of data subjects (the 6th Principle). These rights include the section 13 right for compensation, but also the right to prevent the processing of personal data likely to cause damage or distress (s 10 of the DPA), and the right to rectify or erase information that is inaccurate (s 14 of the DPA).

Therefore in DPA claims, as in misuse of private information (since *Ash v McKennitt* [2006] EWCA Civ 1714), a claim can be brought whether the information itself is false or true. Indeed, the section

14 right of rectification – almost entirely unchanged with the forthcoming Regulation (under art 16) – derives from the 4th Data Protection Principle, namely that it is the responsibility of data controllers to ensure that the personal information they hold (and process) is accurate.

'Personal data' covers all information which is being processed by equipment operating automatically or is kept on a 'relevant filing system' – which essentially means where it can be easily accessed by reference to the data subject (the person to whom the information relates). That person can be any living individual who can be identified from that data, or from other data in the possession of (or likely to come into the possession of) the data controller.

Nor does information need to be 'private' or confidential to fall within the effect of the DPA, or grant data subjects their legal rights. Whilst weight may be given to whether information is already in the public domain in terms of, for example, the likelihood of damage or distress (under ss 10 and 13) or some other harm resulting from unauthorised processing (a security breach under the 7th Principle), section 2 of the DPA prescribes a very literal test to whether personal data is 'sensitive' or not (which will limit the conditions by which a data controller may process that information).

It was established as early as 2003 that a photograph is capable of constituting personal data within the meaning of the DPA (*Campbell v MGN* and *Douglas v Hello! Ltd*). Where a photograph reveals information such as the racial or ethnic origin of the subject, notwithstanding that the information may be widely known, it will fall within the definition of 'sensitive personal data' (*Murray v Big Pictures*).

Data Protection first appeared in early privacy cases brought by Naomi Campbell and Michael Douglas and Catherine Zeta-Jones, although perhaps initially as more of a sideshow. In the Douglas case for example, a court awarded £3,750 for the distress caused by the privacy breach but only £50 each under the DPA. It took the important Court of Appeal ruling in *Vidal-Hall v Google Inc* [2015] EWCA Civ 311 (discussed below) to finally cement data protection as a truly viable standalone alternative.

In *Weller & Ors v Associated Newspapers Limited* [2015] EWCA Civ 1176, the Court of Appeal held unanimously that the High Court had been correct to find the *Daily Mail* liable for both

misuse of private information and breach of the DPA. Paul Weller had initiated proceedings following an article and photographs published by Mail Online which identified the children by name (although incorrectly in the case of the elder daughter, who was identified as his wife).

It was agreed by both parties that the data protection claim stood or fell with the main privacy claim, meaning that the data protection element gains little attention in either the High Court or Court of Appeal judgment. This is a view which has perhaps persisted at the media bar; but data protection lawyers tend not to agree that, on a literal reading of the black-letter law, the overlap between a DPA claim and a tortious claim for misuse of private information will always be quite that neat.

Even so, and while claimants should not expect to ‘double dip’ in terms of damages recovery, the case is yet another reminder of the increase in the use of the DPA in tandem with the more traditional claims of misuse of private information and defamation and shows how the three remedies are being increasingly combined by claimants. The *Daily Mail* was ordered to pay Weller’s costs plus £10,000 in damages (£5,000 for the elder daughter and £2,500 each for the twins).

The Weller proceedings were issued before the *Vidal-Hall* decision, so it seems likely that if they had been issued later, data protection would have played a more major role.

An alternative to defamation?

The impact of the Defamation Act 2013 is often misrepresented as the death of libel cases. While this is not quite the case, the new requirement under section 1 for claimants to show that they have suffered or are likely to suffer serious harm (and for bodies who trade for profit, serious financial loss) has given defendants an answer to many complaints. Data protection represents a viable alternative, especially in light of *Vidal-Hall*, with the lower bar of suffering ‘damage’ by reason of a proven contravention of the DPA.

Equally, in complaints about online content under data protection, ISPs cannot rely on the intermediary defences as they could in defamation, making them quicker to take content down. *Google Spain SL & Google Inc v Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez*, Case C-131/12, established that a search engine is a data controller and has an obligation to remove out of date or ‘irrelevant’ content from search results unless there is an overriding public interest in it remaining. The resulting take-down procedure, the so-called ‘right to be forgotten’, is to be enshrined in legislation once the new Regulation is in force (art 17).

This decision paved the way for Max Mosley to bring a claim against Google under section 10 of the DPA for its failure to remove images taken from undercover footage filmed by a prostitute for the News of the World in 2008 (*Max Mosley v Google Inc and Google UK Ltd* [2015] EWHC 59 (QB)). That case settled before the case could come to trial.

Data protection can therefore arguably go further than defamation, allowing claimants to tackle historic online material where it is merely inaccurate rather than defamatory. As will be discussed further below, where there is a contravention there may also be grounds for a damages claim.

Nor should data protection stand alone. The High Court has

recently confirmed (*His Highness Prince Moulay Hicham Ben Abdullah Al Alaoui of Morocco v Elaph Publishing Limited* [2015] EWHC 2012 (QB)) that a data protection claim can be run alongside defamation. In that case, the claimant had originally issued under libel but later sought permission (after a finding that only one of three pleaded meanings was capable of being defamatory) to add a claim under the DPA. The defendant had put forward various arguments, including that there was no real and substantial tort and that the litigation would ‘not be worth the candle’, making the amendment abusive. The judge rejected this argument, holding that the claim was capable of being a real and substantial tort.

Damages for distress

Section 13(1) of the DPA allows a claimant to apply for compensation where the defendant has failed to comply with data protection requirements and the claimant has suffered ‘damage’ as a result. Section 13(2) specifies that an individual who suffers distress as a result of the breach is entitled to compensation for that distress if: (a) the individual *also* suffers damage by reason of the contravention; or (b) the contravention relates to the processing of personal data for the special purposes.

Prior to the Court of Appeal ruling in *Vidal-Hall*, and despite the suggestion in the earlier Court of Appeal case of *Halliday v Creation Consumer Finance Ltd* (2013), it had been viewed that section 13(2) imposed a bar on recovering damages under the DPA where *only* distress – as opposed to actual financial loss – had been suffered.

For example, in *Johnson v Medical Defence Union* [2007] EWCA Civ 262, the courts had stated that the definition of ‘damage’ under section 13(1) of the DPA was limited to pecuniary loss and could not encompass damage to reputation. That case concerned a claim against an insurer, where the claimant argued that unfair processing of his personal data and subsequent termination of his professional indemnity cover had resulted in damage to his professional reputation. The Court of Appeal held that as the claimant had not suffered pecuniary loss, he could not recover damages for distress under s13, indicating that the law of defamation was the correct field for such losses:

Nor can English law be said in that regard not to respect its obligation to give compensation for loss of reputation caused by unfair processing of automatic data. If an Englishman thinks that that has occurred he can always actually sue in defamation, with the prospect of recovering far more, and on a less exacting basis, than he would find in other member states of the Community.

The tide began to turn with the Court of Appeal in *Murray v Big Pictures Limited* [2008] Civ 446, when the court suggested that earlier court may have construed ‘damage’ too narrowly. The court indicated that this point should be resolved at trial, but the case settled before that could take place. The *Halliday* case raised the prospect that courts might be willing to ‘bolt on’ substantial damages for distress having only made a nominal finding of actual loss, but when the defence ceded the point the case was resolved without a ruling on the issue.

The position changed in 2015 when *Vidal-Hall v Google Inc* [2015] EWCA Civ 311 established that damages for breach of section 13 of the DPA can be awarded even where there is no evidence that financial loss has occurred.

The case (concerning an application to serve outside the jurisdiction) was brought by a group of claimants who claimed that by tracking and collating information relating to their internet usage on the Apple Safari browser without their consent, Google had (amongst other wrongs) breached its obligations under the first, second, sixth and seventh principles of the DPA. Buxton J’s earlier comments, the court found, were *obiter* and not binding. The DPA claim could now take centre stage in media litigation – with the important caveat that the Supreme Court has granted Google permission to appeal.

Subject access requests as a disclosure tool

Although not exclusive to media cases, data protection is also increasingly being used as a tool in the form of subject access requests where litigation is contemplated as an alternative to an application for early disclosure under the Civil Procedure Rules.

The case of *Gurieva & Anor v Community Safety Development (UK) Ltd* [2016] EWHC 643 (QB), concerned a private investigations company who had been investigating the claimant for the purposes of a private criminal prosecution in Cyprus. The claimants made a subject access request and, having been dismissed with what the judge described as ‘to say the least, surprising points to take’, made an application for an order under section 7(9) of the DPA (courts having the power on application to compel data controllers to comply with subject access requests).

The defendants contended the claim on three grounds: (1) the validity of the subject access request; (2) that the personal data was exempt from the regime by way of the crime and privilege exemptions; and (3) that the claim was an abuse of process, with the subject access request being used as a device with the purpose of gaining an illegitimate procedural advantage in the Cyprus proceedings. Whilst the UK’s data protection regulator, the Information Commissioner’s Office (ICO), takes the strong view that a data controller’s obligations to comply with a SAR must be motive-blind, the courts have tended to take a different view (see *Dawson-Damer v Taylor Wessing et al* on the question of abuse of process).

In *Gurieva*, Warby J demurred from the usual line taken by the bench:

I have difficulty also with the notion that the use of a SAR for the purpose of obtaining early access to information that might otherwise be obtained via disclosure in pending or contemplated litigation is inherently improper.

In coming to this conclusion Warby J quoted from an early 2012 Court of Appeal case, in which Kay LJ observed:

I do not doubt that a person in the position of the claimant is entitled — before, during or without regard to legal proceedings — to make an access request pursuant to section 7 of the Act. I also understand that such a request prior to the commencement of proceedings may be attractive to prospective claimants and their solicitors. It is significantly less expensive than an application to the court for disclosure before the commencement of proceedings pursuant to CPR r 31.16. Such an access may result in sufficient disclosure to satisfy the

prospective claimant’s immediate needs. ...

The case shows that data protection is not only a useful remedy in itself, but a valuable tool in other litigation.

Data breach as a basis for claim

One area of data protection law where organisations are already braced for significant financial consequences is in data security failure (where there is contravention of the 7th Principle). The DPA requires that data controllers take appropriate measures to safeguard personal data from accidental loss or unlawful or unauthorised access. Even now, the ICO regularly issues six-figure fines where serious harm is likely to result from these breaches (a list of enforcement action the ICO has taken, against both private companies and public authorities, is available on its website). Under the greater powers afforded national authorities under the new Regulation (up to €10 m or 4% of global turnover) such action is only likely to become more draconian.

What might change the game in terms of claims by individuals is the Morrisons data breach, where a group litigation action – reported to number at least 5,000 claimants – is in process after a disgruntled staff member leaked payroll information of tens of thousands of colleagues, potentially exposing them to financial fraud and identity theft. At issue in the case will be issues of vicarious liability (which might derive from a single unlawful act by an employee) as well as the adequacy of Morrisons’ data security measures (as s 13 claims require a proven contravention of the DPA, before questions of damage or distress may be considered).

The court’s deadline for new claimants to join passed in April 2016, so next steps will be watched with interest: not simply in how the claim will be pleaded, but also whether Morrisons will accept liability and offer compensation. With damages recovery under DPA claims still at the thin end of the wedge, defendants may be tempted to ‘low-ball’ offers of amends or roll the dice on how the Court will approach this relatively new territory.

Comment

It seems data protection is not merely here to stay in the context of media litigation, but – depending on the Supreme Court decision in *Vidal-Hall*, and the fate of Morrisons – could be ready to take centre stage.

While damages remain low in data protection claims, the same was once true in the context of misuse of private information. As first the *Mosley* case, then the Mirror hacking damages demonstrated, the courts’ approach can change over time: and *Vidal-Hall* only emphasises the point. In the meantime, the real value of a data protection claim can be in the difficulties it creates for data controllers by way of nuisance value. As both the media bar and the general public see the growing evidence of the power of individual DPA rights, we can expect an upward curve in the use of data protection law: and, it seems, see it put to some novel uses.

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Case Notes & Comments

The last post? Third party internet liability and the Grand Chamber of the European Court of Human Rights: *Delphi AS v Estonia* revisited

Introduction

Since the advent of the internet, and the proliferation of fora for the instantaneous dissemination of views and opinions – often posted in haste and repented at the leisurely perpetuity of the permanence of cyberspace – concerns have been raised as to the prospective liability of third party facilitators for the outspoken (and often anonymised) comments of the users of these services. Thus far, the European Court of Human Rights (ECtHR) has yet to develop an extensive and convincing corpus of jurisprudence concerning the regulation of the internet. This has been amply illustrated in the context of extensive litigation arising from Estonia, a relatively diminutive jurisdiction in physical space but a comparative giant of the virtual world, having pioneered among other leading innovations the development of Skype, the financial transfer revolution of Transferwise, the Tallinn Principles on electronic warfare and the novel entitlement of e-citizenship to interested foreigners. With almost universal wifi coverage across Estonia and an exceptionally computer-literate population spanning all generations, internet communication in this corner of the Baltic region is an essential aspect of daily life. Perhaps inevitably, then, given the ubiquity of on-line services and processes, Estonia also appears to be at the vanguard of litigation concerning the prospective (ab)use of the internet.

This has proved to be the case in what began as a relatively modest dispute over abusive comments by largely anonymous users of internet news portals. In *Dephi AS v Estonia*, the ECtHR was required to consider – for essentially the first time – the parameters of liability for third parties providing internet services that, however inadvertently, allow for the dissemination of libellous, offensive and threatening statements to a global audience. This case has engendered significant domestic litigation, including the intervention of the Supreme Court of Estonia, as well as two separate judgments of the ECtHR on the issue, the latter of which was rendered in June 2015 and may arguably require significant reconsideration in future cases of this nature.

Facts of the dispute

The applicant was the owner and operator of Delphi, an Estonia-based internet news portal publishing over 300 news items daily, with significant web-traffic across the Baltic States. The Delphi website allowed for an ‘add your comment’ section, whereby interested users could automatically upload their comments on particular news stories in a manner that was not subject to prior screening by the administrators. Delphi attracted an average of some 10,000 individual comments daily, with such interjections ostensibly subject to the rules of procedure of the website. To this end, submissions that contained particular proscribed words were automatically deleted, while users undertook not to post profane, defamatory, threatening or spam uploads to the website. To the extent that comments were actively policed in real time, readers were allowed to mark particular contributions as *leim* (roughly translated as ‘troll’ or ‘WUM’ [wind-up merchant] in Estonian from the English webpage vernacular), which would then be swiftly removed by the moderators. Despite this system, however – in the eyes of the Estonian government at least – Delphi had long attracted a degree of national notoriety as an e-depository for libellous statements, threatening language and public insults.

One such incident triggered the legal proceedings in question. On January 24, 2006, Delphi posted a news story entitled ‘SLK Destroyed Planned Ice Road’. Given the extremely cold winter that particular year, the small sea passage between the Estonian mainland and the large eastern islands of Saaremaa and Hiiumaa had frozen. Under Estonian transportation law, the general public is entitled to use these temporary ‘roads’ across the strait upon the ice. The story related to the lobbying against the ice road by Saaremaa Laevakompanii, the leading ferry operator providing transit services in this area, which had unilaterally adjusted its shipping routes and required the strait to be cleared with icebreakers, thereby preventing the establishment of a free road to the mainland for a short period of time. The story triggered a considerable number of comments, many expressing crude frustration at the loss of a potentially significant financial saving by island residents, including approximately 20 posts personally directed at L, the majority shareholder of the company and a controversial local entrepreneur, who was duly blamed for the high ferry prices and perceived unreliable service offered by SLK. A number of these posts insulted L’s Jewish ethnicity while the general tone of the missives were insulting and contained a degree of threat to his safety, irrespective of the ultimate likelihood of physical violence against him, including exhortations to drown L in these waters. On March 9, 2006, L requested that the comments be removed from the website and demanded compensation of 500,000 EEK (approximately €30,000). Delphi removed the comments that day but rejected the financial claim – and, indeed, continued to do so until this final verdict.

In April 2006, L brought an action against Delphi at the Harju County Court in Tallinn. The court rejected the claim on the basis

that, under the Information Security Services Act, the comment section should be distinguished from that of the news portal and accordingly Delphi’s role in the public abuse of L was ‘essentially of a mechanical and passive nature’.¹ Delphi was therefore not considered the publisher of the offending remarks and had no legal obligation to monitor the comments of its readership. This decision was, however, quashed by the Tallinn Court of Appeal in October 2007, which considered that the Harju County Court had erred in its interpretation of the legislation. The case was remitted back to the court, which subsequently ruled in favour of L, awarding the rather modest sum of €20 in compensation. Appeals by Delphi to the Tallinn Court of Appeal and the Supreme Court of Estonia were ultimately unsuccessful, although the Supreme Court varied the legal basis of the judgment, ruling that there had been an interference with Delphi’s fundamental right to free expression, but this was justified by the Constitutional obligation to ensure the honour and good name of third parties. This decision was then appealed before a chamber of the ECtHR, which initially heard the dispute in October 2013, from which the present action was reconsidered.

Dephi AS v Estonia

The initial ECtHR judgment

The initial judgment of the ECtHR considered that the rights of the applicant under article 10 of the European Convention on Human Rights had not been breached by the national authorities in this instance.² In so doing, the court considered that the Estonian judiciary was of the opinion that Delphi was not protected under either the EU Directive on Electronic Commerce³ or the Information Society Services Act, the most pertinent domestic statute. Accordingly, the court was reluctant to second-guess these findings and to impose its view of the national legislation upon the domestic judiciary, which remained in a far stronger position to interpret and apply these provisions. In any event, the Strasbourg court was satisfied that the Estonian provisions had clearly established that a media publisher would be liable for defamatory statements published under its auspices. Moreover, the chamber considered that, as a professional publisher, the applicant was well-placed to assess these risks and to have implemented a suitably robust system of safeguards to prevent the abuse of named individuals by a host of anonymous keyboard commentators. Likewise, given the fact that Delphi could have anticipated a suitably vociferous response from commentators to a controversial issue of community interest, the chamber considered that the applicant could realistically have been expected to have taken additional safeguards to protect the reputation of the subjects of its articles. The published comments were indisputably defamatory and the offended party had little other realistic recourse for relief other than to pursue the applicant under these circumstances. Accordingly, the purported restrictions placed upon the applicant’s exercise of freedom of expression were considered to have been both proportionate and necessary in a democratic society and the chamber found in favour of Estonia under these circumstances.

The thread continues

On June 16, 2015, the Grand Chamber of the Court rendered judgment in response to the applicant’s appeal against the earlier decision by the ECtHR. The arguments raised by Delphi towards quashing the earlier ruling were essentially four-fold. Firstly, on a conceptual level, the role of internet commentary posits a vital contribution to public discourse and assists both in securing

participation in debates on matters of public importance, as well as bringing the existence of the debate to wider public attention. As such, these advantages would be nullified if an internet host were to be obliged to censor the debate due to the fear of litigation. Secondly, Delphi invited the court to reconsider its interpretation of the status of the web host as the ‘publisher’ of the material and to instead view it as a mere ‘intermediary’, which would accordingly bear lesser culpability for the comments of its contributors. Thirdly, and on an allied note, Delphi considered that, contrary to the initial judgment, the interference with its article 10 rights had not been prescribed by law, since there appeared to be no legislation or case-law pertinent to Estonia by which an internet host could be clearly considered to be the publisher of the material under these circumstances. If anything, the EU Directive appeared to provide a defence to such operators where they acted expeditiously to remove problematic content, as Delphi contended had been the case in this instance. Finally, the applicant argued that the interference with these rights was not necessary in a democratic society, since the practical implications of the chamber judgment would require an internet host to employ a significant cohort of personnel to monitor every single comment on the website and to err on the side of censorship lest offence be caused by any subsequent post, or to abandon the possibility of commentary altogether, neither of which would serve the public interest or contribute to democratic participation.

In response, the Estonian government contended that the technical interpretive questions raised by Delphi as to the precise legal status of the internet host could be more appropriately directed to the national courts and the EU judicial mechanisms respectively. Moreover, the respondent argued that since Delphi had specifically invited comments from its readership and remained the only authority able to remove offending remarks, its liability should be considered in this context. Indeed, it was argued that Delphi had sought to entice comments by emphasising the more polemical local issues on its website and, to a considerable extent, its business model depended upon creating additional interest and web traffic from within the community to maximise advertising revenues. On a practical basis, the ‘chilling effect’ alleged by Delphi of pre-censorship or intrusive monitoring had not been borne out following the decision – indeed, if anything, Delphi had since improved its market share of the internet news traffic without any discernible commercial disadvantage to improved oversight of the conduct of its contributors. Concerning the lawfulness of the restrictions, the government pointed out that the legislation did not specify that an internet host could not be considered the publisher of any subsequent material by its users. Likewise, as regards the necessity of such interference in a democratic society, the respondent argued that the protection of the honour and reputation of individuals was also a significant objective and that the instantaneous nature of internet communications meant that remedial action by the publisher – or indeed an intermediary – may well be insufficient to prevent lasting damage to the victim of a defamatory or offensive sentiment.

The action before the Grand Chamber also prompted interventions from a number of free speech campaigners and NGOs, as well as representatives of similar companies across Europe, concerned at the potential implications of the previous judgment. To this end, the claims by Delphi were buttressed by supporting statements emphasising the need to adopt a more flexible approach to new forms of communication and drawing distinctions between the editorial roles of newspapers and print publishers on the one hand, and those charged with monitoring more instant communications on the other. It was also argued

that the spirit of the EU legislation was to shield operators from precisely this type of claim, while other NGOs contended that the applicant should not be held accountable for the failure of the national government to provide a clearer and more prescriptive legislative system to address the issues raised in this case.

In addressing these issues, the Grand Chamber observed that this appeared to be ‘the first case in which the court has been called upon to examine a complaint of this type in an evolving field of technological innovation’.⁴ To this end, the court took as its starting point the views of the Supreme Court of Estonia, which observed that a distinction could be appropriately drawn between print and internet-based editors, the latter of which could not reasonably be expected to edit comments in the same manner as a newspaper editor or book author. Moreover, the court considered the tone of more recent instruments addressing internet regulation developed by the Council of Europe, which implicitly mandate subtle distinctions in the treatment of internet-based statements as opposed to the prospectively more reflective nature of paper-based dissemination. Clearly, however, this did not provide carte blanche for internet-derived statements to be viciously defamatory or patently offensive. As such, the Grand Chamber purported to measure the adequacy of Delphi’s editorial activities for the purposes of the protection of article 10 against the backdrop of this emerging legislative context.

A core issue that appears to have distinctly coloured the view of the Grand Chamber in this respect is the market status of Delphi within Estonia at the material time. Indeed, the court stressed from the outset that ‘the present case relates to a large professionally managed Internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them’.⁵ The applicant was accordingly to be considered distinct to a bulletin board in which discussion proceeds without editorial steering, or indeed the output of a social media site in which no content is authored by the platform provider and moderation services may be applied by volunteers and hobbyists. In reviewing whether the initial ruling by the Estonian authorities had been prescribed by law, the court observed that a number of states had struggled with regulating the national internet and that the principle of ‘differentiated but graduated’ regulation of new media advocated by the Council of Europe will necessarily require time to be fully implemented and entrenched. Nevertheless, in the view of the Grand Chamber, the Estonian legislation allowed for the possibility of damages to be imposed upon internet sites such as Delphi for the libellous and threatening comments of its public contributors. Accordingly, given the resources at the disposal of the applicant, as well as its enhanced understanding of the climate of media regulation in Estonia, the court considered that Delphi should have sought legal advice to clarify their obligations as a third-party facilitator of published comments.⁶ The restrictions imposed on Delphi’s activities by the national courts were therefore considered inherently lawful.

Much debate was centred upon the question as to whether interference with the article 10 rights of the applicant was thereby necessary in a democratic society. In this respect, the comments themselves failed to merit the protection of article 10 since it was a matter of agreed fact between the parties that they were defamatory and, due to several crudely anti-Semitic posts that were accompanied by vague intimations of prospective violence towards L, may well have also crossed the threshold to qualify as hate speech. Instead, the issue confronting the Grand Chamber was whether the imposition of liability upon Delphi for such remarks was compatible with the principles of freedom of expression as guaranteed by the ECHR. For the Supreme Court of

Estonia, liability was essentially founded on the basis that Delphi had breached the Obligations Act, the primary codification of the national law of torts, on the basis that it had failed to immediately remove the contents of the offending posts and, moreover, should have realised that the posts were indeed offensive and defamatory. In considering this issue, the court considered that Delphi was the only party able to delete the comments once they had been posted and had developed a clear set of rules, as well as a system for the removal of offending words, to address this potential eventuality. To this end, it was confirmed that the applicant exercised control over these statements, as had been initially held by the various tiers of the Estonian court system.⁷ Moreover, given the difficulties that would have been faced by L in determining the identities of the anonymous commentators, the court confirmed its earlier jurisprudence that the risk under such circumstances should essentially be borne by the media outlet,⁸ especially given the control exercised by Delphi in the present case.⁹

A key complicating factor in determining the precise principle underpinning the finding of liability by the Supreme Court of Estonia related to its interpretation of the Obligations Act which, in the view of the Grand Chamber, ‘did not explicitly determine whether the applicant company was under an obligation to prevent the uploading of the comments on the website or whether it would have sufficed under domestic law for the applicant company to have removed the offending comments without delay after publication’.¹⁰ The distinction was significant since the former interpretation would have essentially required a process of prior censorship, while the latter would have prospectively allowed a greater degree of leeway for the applicant to have acted in a manner in which English law would have considered commensurate with the standards of responsible journalism. In the event, the Grand Chamber favoured the latter interpretation and duly considered that the domestic ruling did not compromise article 10.¹¹ More specifically, the court considered that the precise words used by a number of the commentators might justifiably be considered hate speech. Under these circumstances, a seemingly higher duty of vigilance was considered appropriate and the societal imperatives of quashing such statements may accordingly ‘entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 of the Convention, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties’.¹²

In sum, the fact that Delphi was the sole entity able to remove such comments from its website, combined with the view of the Grand Chamber that the Estonian judiciary had advanced an interpretation of national tort law that was compatible with free expression and the modest financial penalties imposed for its breach, alongside the need to further guard against the prevalence of hate speech in society, especially where readily and globally accessible, and the fact that ensuring additional safeguards had not engendered dramatic adjustments to Delphi’s business practices or operating costs meant that article 10 had not been breached in this individual instance.

These findings were upheld by a majority of 15 judges to two, with a robust dissenting opinion from Judges Sajó and Tsotsoria. Here, the judges expressed strong reservations that the position of intermediaries, which had proved problematic since the days of quill and parchment, continued to give rise to legal perplexity within a more advanced technological era. Particular concern was reserved for the seeming endorsement of the position of the Supreme Court of Estonia, which had arguably set the standard

for removal of problematic comments based on the immediacy of publication, rather than the actual knowledge of the intermediary in question. Accordingly, Delphi was expected to have removed such comments immediately upon their utterance – which would have essentially required a degree of pre-censorship, if not the constant real-time policing of additions to the website – rather than upon reflection and in the light of actual knowledge of the statements on the part of the operators of the website. The judges also questioned strongly the status of Delphi as an active, rather than a passive, intermediary, as well as whether the applicant could have realistically obtained helpful legal advice on their potential liability, given that the law was in a state of flux on both a national and supranational level, while the ECtHR itself had yet to rule with any degree of coherence on the matter. Concerns were also raised at the apparent emphasis placed by the majority on the professional – ie profit-making – role of Delphi and whether such factors actively made a legitimate difference to the liability of a third party web host. In finding that the applicant’s rights under article 10 had been violated, the judges considered that there was little sensible foundation for the operation of an essentially strict liability provision and, in a thought-provoking appendix to their ruling, urged their judicial brethren not to smother the potentially revolutionary impact of new media on ensuring that democratic and libertarian principles remain upheld.

Commentary

The decision in *Delphi AS v Estonia* represents the first meaningful foray by the ECtHR into the troublesome realm of the legal status of third parties for problematic comments made on websites. For the target of such comments, the only meaningful avenue for redress is often against third parties, since the bane of the libel is usually inflicted by anonymous or pseudonymic contributors who may likely be based outside the jurisdiction in which most harm is done. This is true even of the internet wares of Delphi, providing a service in a language for which there are relatively few native speakers in a country that is at the forefront of computer-tracking technology. The prospects for pursuing commentators writing in, for instance, English, remains exponentially more difficult. The emerging regime of new media regulation – and, invariably, the European Court of Human Rights – faces a difficult balancing act in reconciling this practical position with developing a fair and realistic framework to engender responsible web hosting. Clearly, there remains a strong public interest in curtailing the activities of web trolls and other cyber-bullies, while the internet should not provide a shield to allow for a form of absolute privilege for unfettered libel or threat. Nor, however, should websites that purport to promote active debate on issues of public interest – along with the heated views that often accompany exchanges on community and political matters – be subject to an exacting regime of pre-censorship for fear of litigation and sanction. Against this backdrop, the

position taken by the Court in *Delphi* provides a series of causes for concern.

In the first instance, a degree of unease surrounds the continued emphasis placed by the court on the fact that Delphi was most accurately classed as a professional, profit-making entity and thereby distinguished from other fora, especially those operated by amateurs. In many respects, cyberbullying and other forms of abusive comments may have a greater impact on social media and hobby sites, given the smaller nature of the community involved, yet such operators appear to lie outside the broad principles established under *Delphi*. Were the same comments to have been added to L’s Facebook account or Twitter feed, the third party hosts would have presumably avoided liability, whereas *Delphi* was expected to have immediately addressed these statements at source.

Secondly, as argued elegantly by the dissenting judges, concerns may also be legitimately voiced as to the expected role of the third party who, under Estonian law at least, appears to be held responsible where offending comments are not immediately deleted by a highly effective internet filter or an expanding cohort of website monitors. There appears to be limited provision for an actual knowledge standard, which would appear to operate rather more equitably under such circumstances; the intermediary would be expected to respond to complaints by victims of on-line comments and, upon reasonable reflection as to whether such grievances were legitimate or merely vexatious, be judged by the immediacy and adequacy of their subsequent response. In this respect, the modest environment of the Harju County Court appeared to initially strike a logical balance, before being overruled by its rather more rarefied colleagues in Tartu and Strasbourg respectively.

Ultimately, all participants in this dispute – from the litigants to the judiciary – were hamstrung by having to chase something of a moving target: the development of effective principles to address respective obligations and liabilities in internet-based cases. The present litigation raised the allied, but in this case peripheral, concern that the position under EU law remains in flux and the transposition of such legislation into domestic law is likely to raise considerable and ongoing problems of interpretation, not least as to the precise status and designation of web portals and other operators under the law. Regrettably, the decision by the Grand Chamber has offered little assistance to these travails and *Delphi AS v Estonia* is likely to be but the first of many similar cases to attempt to find a pragmatic and equitable boundary in the context of internet-based claims.

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Notes

- ¹ *Delphi AS v Estonia*; Application No 64569/09, at para 23.
- ² For commentary on the initial decision of the ECtHR see M Susi, ‘Delphi AS v Estonia’ (2014) 108 *American Journal of International Law* 295.
- ³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] *Official Journal L*.
- ⁴ At para 111.
- ⁵ At para 115.

- ⁶ At para 129.
- ⁷ At para 145.
- ⁸ *Krone Verlags GmbH & Co v Austria (No. 4)* (Application No 72331/01).
- ⁹ At para 151.
- ¹⁰ At para 153.
- ¹¹ *Ibid.*
- ¹² At para 159.

Reporting restrictions: a losing battle? *BC & Eight Other Media Organisations, R (on the application of) v F & D* [2016] EWCA Crim 12

Introduction

The law relating to the reporting of criminal proceedings in the UK is an area of labyrinthine complexity, comprising a mixture of general statutory provisions such as the Contempt of Court Act 1981, specific provisions such as the closed material procedure¹ used in terrorist and sanctions-related cases, and the courts' inherent jurisdiction overlaid by general human rights provisions such as articles 6 and 8 of the European Convention on Human Rights 1950. Issues arise before trial², during the trial and post-trial.³ A further complicated regime governs criminal proceedings in relation to minors.

In the writer's view a major review is needed by the Law Commission with a view to producing a coherent statutory regime, supplemented by detailed codes of guidance issued for the media by the Attorney General. There is a particular need to clarify the law in relation to the development of social media sites such as Facebook. The issue has been complicated by the development of social media platforms and their global nature. Whatever may be the position in the UK, absent an effective global response, domestic UK court orders are of course not binding on foreign based sites and anyone with even the minimum of 'media savvy' can usually find out what they want to know fairly easily. This in turn raises issues as to the effectiveness and proportionality of asking organisations such as Facebook to act as gatekeepers in enforcing reporting restrictions. A further problem is that even if media win at first instance, the appellate courts are more prepared to intervene to modify and vary restriction orders. In *R v Sherwood ex parte Telegraph Group* the court stated: 'It is the duty of an appellate court, when considering open justice as an appellate court, not simply to review the decision of the judge but to come to its own independent decision.'⁴

A constant battle is going on between the courts' consistent commitment to open justice and the increasing web of restrictive rules on reporting. Radical notions of simply not naming the accused or suspects at least until found guilty, or earlier if in the public interest (eg when someone is on the run, or there is genuine interest in other victims coming forward as in sexual abuse cases), are a non-starter for practical purposes. In theory they would remove many of the problems and create a clear bright line for the media and communications industry, but open justice sells papers – see *In re S (FC) (a child)* [2004] UKHL 47. A good overview of the balancing exercise that is involved in these issues (albeit in relation to deportation proceedings) is the Supreme Court decision in *A v BBC* [2015] AC 588.⁵

Reporting contemporary proceedings

Section 4 of the Contempt of Court Act 1981 (CCA) states:

(1) Subject to this section a person is not guilty of contempt

of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.

(2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

(2A) Where in proceedings for any offence which is an administration of justice offence for the purposes of section 54 of the Criminal Procedure and Investigations Act 1996 (acquittal tainted by an administration of justice offence) it appears to the court that there is a possibility that (by virtue of that section) proceedings may be taken against a person for an offence of which he has been acquitted, subsection (2) of this section shall apply as if those proceedings were pending or imminent.

A common usage of the section is stop reporting of the trial of A until a separate trial involving the same offence against B is completed. The section is not designed to prevent the reporting of issues which are embarrassing or difficult for defendants, and issues have been raised from time to time, particularly in cases involving children, about confidentiality being granted to prevent the defendant being subject to vigilante attacks.⁶

The Wrightson murder case

This case concerned the murder of a vulnerable woman, Angela Wrightson, in her own home by two teenage schoolgirls. The first trial had to be scrapped and the jury discharged following a large number of prejudicial and hostile statements on social media following an initial report in the *Hartlepool Mail* of the opening of the trial – 'an avalanche of prejudicial comments' in the words of the trial judge, Sir Henry Globe QC. He was alerted to some 500 of such statements, and the commentators were described by the prosecution as a 'virtual lynching mob.' The comments were linked to media websites on Facebook following what were fair, accurate and reasonable reports.

The trial was abandoned and an order made prohibiting the reporting of the case until verdicts were returned in the new trial. The order prevented the posting of coverage to social media by reporting organisations, as well as restricting comment facilities and links to social media on the organisations' own websites. An appeal against the breadth of the order was rejected by the trial judge. The media continued to argue that the order was disproportionate and unworkable. This led the judge to modify the order and make a general postponement order which prevented any reporting of the case until verdicts had been returned in the retrial. The media appealed this order, but the judge rejected their submissions. Issues such as the technical problems in controlling feed and archives, and of course what was posted on Facebook itself, did not move the judge to modify his position.

The net outcome was that the order prevented reports of the trial being placed on Facebook, made media organisations disable the comment facilities on their own websites in relation to the coverage of the trial, and directed that the order be published to the Press Association. The case invoked media concern because it was apparently the first time that a senior court had imposed explicit restrictions on the posting of comments on media

organisations' websites and media use of Facebook.

The judge initially invoked section 45 of the Senior Courts Act 1981 (SCA) relating to the general jurisdiction of the Crown Court:

(4) Subject to section 8 of the Criminal Procedure (Attendance of Witnesses) Act 1965 (substitution in criminal cases of procedure in that Act for procedure by way of subpoena) and to any provision contained in or having effect under this Act, the Crown Court shall, in relation to the attendance and examination of witnesses, any contempt of court, the enforcement of its orders and all other matters incidental to its jurisdiction, have the like powers, rights, privileges and authority as the High Court.

The revised order was made using section 4(2) of the CCA 1981:

1. The order made under s 45(4) of the Senior Courts Act 1981 on 3rd July 2015 be revoked.
2. Pursuant to s 4(2) Contempt of Court Act 1981 and subject to the specific exception in paragraph 3, the publication of any report of these proceedings or any part of these proceedings in [sic] postponed until the return of the verdicts in relation to both defendants or further order of the court.
3. After discharge of the jury today, the following facts may be reported: 'The jury in the trial of two teenage girls charged with murdering a 39 year old woman has been discharged. All parties agreed to the proceedings at Teesside Crown Court following the death of Angela Wrightson being halted. Mr Justice Globe directed that the trial of the two girls will take place on a later date. Miss Wrightson was found dead in her home in Stephen Street, Hartlepool last December.'

The schoolgirls could not be named but were sentenced to life imprisonment and to serve a minimum of 15 years following a second trial. They were aged only 15 and 14 at the time of trial, but under minor reporting rules the media could press for anonymity to be lifted and for them to be named in the public interest after the verdict, sentence or the outcome of any appeal. The media were restricted in what they could report about the reasons for the abandonment of the first trial.

A number of media organisations, including the BBC, appealed. The Court of Appeal⁷ was presided over by Sir Brian Leveson, President of the Queen's Bench Division, who is of course well versed in media matters and reporting practices. The executive editor of the BBC News website for England was reported as saying:

It was important for the local community, which has been shocked by Angela's death and deserve to know how the judicial case was proceeding, but also important in protecting the wider principles of journalistic freedom to report to an open court. As digital platforms have emerged as a key way to bring news to audiences, so has reporting and the application of the law to journalism. The BBC will continue to report legal proceedings across available platforms in a responsible and transparent way.

It has to be borne in mind that this process took seven months to resolve for the media. The court was aware of the wider ramifications of the case, as Leveson P observed:

This case, for the first time, raises the issue of how critical fair trial protections can be extended to prevent or control communications on social media(at para 2).

*We are conscious that although we have received comprehensive submissions both from the media organisations, the Director of Public Prosecutions and the individual defendants, there is no doubt that there are wider issues involved than encompassed by this particular litigation. **We have no doubt that the Attorney General (as guardian of the public interest in this area) should be involved in a general analysis of the overall position in order that a wider consultation can take place and appropriate guidance issued** [emphasis added]. In this regard, we welcome Mr Caldecott's observations that this appeal was not approached as contentious litigation between the parties but with a genuine wish to resolve what is clearly an important practical problem (at para 40).*

The court was in no doubt of the serious prejudice caused by the comments, and rejected arguments based on the robustness of juries, judicial directions and the fact that the comments would not really be picked up given the vast amount of material placed on Facebook and other sites (see paras 29-35):

Suffice to say, we have no doubt that the publication on social media of comments of the type which caused Globe J to discharge the jury in Teesside would create a substantial risk of serious prejudice which could easily threaten a second trial as it undermined the first. Testing it another way, it is inconceivable that a responsible media organisation would allow comments on their own websites of the type of which complaint is made: even if comments of any sort were permitted (which we doubt) they would be moderated and excluded. We see no reason why the approach should be different when the report is copied onto the media organisations' Facebook or other social media site (at para 36).

The court did not feel it necessary to develop the law in new ways (para 38).

The media sought to argue that they were not the publishers of the comments and even if under section 3(2) CCA 1981 they were to be treated as distributors they were not liable as at the time of the distribution (having taken all reasonable care) they did not know that the communications contained such prejudicial matter and had no reason to suspect that they were likely to do so. In the light of the submissions for the media the court did not analyse whether the media could be deemed to be publishers under section 3(1). This is a problematic issue as the Act is to say the least enigmatic on what a 'publisher' is. Section 2(1) merely states: 'for this purpose "publication" includes any speech, writing, [programme included in a cable programme service] or other communication in whatever form, which is addressed to the public at large or any section of the public.' Section 19 states that

'to publish' is to be interpreted in the light of this definition. Surely it is arguable that by inviting comments and creating an accessible comment section following the relevant article or links etc, the media organisation, while not obviously adopting the content of the blog or post, is nevertheless publishing it as part of their commercial enterprise in part to show how their articles are read and worthy of provoking public comment? In the end the issue was not decided as the court went down the road of treating media organisations as distributors.

Ultimately the issue came down as to whether the restrictions

involved were a disproportionate interference with the article 10 ECHR 1950 (freedom of expression) rights of the media in reporting criminal proceedings. The court came clearly to the view that a website 'RIP Angela Wrightson' on Facebook did contain material which potentially prejudiced the rights of the defendants to a fair trial and created a substantial risk in relation to the carrying out of the second trial. It was thus contrary to the strict liability rule under section 2 CCA 1981. Facebook was directed to remove the link subject to an opportunity within seven days to apply to discharge the order if so advised. The court also emphasised that posters of comments as well as the media could and would face action.

In relation to the media a new order was put in place:

.....order the media organisations, until verdicts in the criminal trial or further order (a) not to place any report of the criminal trial of F and D on their respective Facebook profile page or pages and (b) to disable the ability for users to post comments on their respective news websites on any report of the criminal trial published by the media organisations on their websites. We direct that this order shall also be published to the Press Association so that other media outlets not specifically involved in or aware of these proceedings may take appropriate steps to ensure that they do not risk a breach of the 1981 Act on the basis that, in the light of the foreknowledge available from these proceedings, the defence of reasonable care provided by s 3(2) of the Act will not be open to them (at para 44).

Finally, the Court of Appeal decision itself was not to be reported until after the conclusion of the second trial.

Comment

Ultimately the burden on the media was not as draconian as being argued, but the court did impose obligations on organisations to monitor more closely their web comment columns because even

under the more generous distributor provision in section 3(2) CCA 1981 reasonable care has to be taken to avoid publication of substantially prejudicial material. There clearly needs to be more examination of the technical issues in relation to comments being placed on social media pages on sites such as Facebook.

Interesting questions might have arisen if direct action had been taken by the Attorney-General relying on the strict liability provision in section 2 CCA 1981. Given the context it seems the media could hardly argue that they had exercised reasonable care, at least in respect of those newspapers based in the North East of England – the location of the gruesome event. National newspapers might perhaps have claimed they were more remote, and that one might not expect readers of quality newspapers at least to be placing such incendiary comments in their comment columns? The issue as to how far the moderation action should extend to all websites remains somewhat unclear in circumstances where a page is placed on just the more popular ones, such as Facebook. Again, given the nature of the case there was the issue of whether Facebook and other site owners should have acted as a gatekeeper. Could the Press Association notice be treated as a 'takedown' notice requiring greater moderation on their part instead of, as here, waiting for a court direction to remove the comments?

Clearly guidance from the Attorney General would be welcomed, but so would a general overhaul of the complex reporting regimes in relation to criminal and indeed civil proceedings. There is also of course the self-evident point that we are talking about matters in England and Wales; whether this impacts on the wider world beyond these shores raises further questions of jurisdictional reach and the possible (albeit unlikely) prospect of some harmonisation on the issue within the European Union at least. Diligent searchers on juries may well still find the information they are seeking, despite directions and threats of fines or imprisonment.

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Notes

- 1 See Pt 6 Counter-Terrorism Act 2008, *Al Rawi v Security Service* [2012] 1 AC 531 and *Bank Mellat v HM Treasury* [2014] AC 700, [2015] HRLR 6.
- 2 Such as the recent controversy about whether suspects facing potential sexual abuse allegations, currently in the UK often of a historic nature, should be granted anonymity at least until any actual charge is brought. The recent investigations of allegations of child abuse involving the late Conservative Home Secretary, Leon Brittan and the former head of the army Lord Bramall have raised issues about the distress caused to them and their families and the fact that even if not subsequently charged there is left a feeling among many of 'no smoke without fire' and 'mud sticks'. See 'Reporting on historical sexual abuse allegations requires great care, Chris Elliott, *The Guardian*, 15 February 2016 and perhaps ironically given their reputation over exposes, hacking etc 'Blameless: No justice for CLEARED D-Day hero Lord Bramall after false accusations', *The Sun* <http://www.thesun.co.uk/sol/homepage/news/6868120/No-justice-for-cleared-veteran-Lord-Bramall.html>
- 3 See *Guardian News & Media Ltd v Incedal* [2016] EWCA Crim 11, where the

- Court of Appeal upheld an order prohibiting reference to material from a concluded terrorism trial on grounds of national security and the court further deprecated the presence of accredited journalists during any part of the trial held in camera. At a pre-trial hearing a differently constituted Court of Appeal ([2014] EWCA Crim 1861; [2015] 1 Cr App R 4) had directed that the trial should have three elements – part I would be in open court, part II could be attended by nominated and approved journalists, but without taking notes (and indeed significant steps were taken to ensure that there were none), and finally part III in camera. Then at first instance Nicol J held that the whole trial should be in camera.
- 4 [2001] EWCA Crim 1075; [2001] 1 WLR 1983.
 - 5 See Pillans, 'Another serving of alphabet soup' (2014) 19 CL 130-35.
 - 6 *R v Newtownabbey Magistrates Court ex parte Belfast Telegraph Newspapers Ltd* [1997] NI 309.
 - 7 Utilising s 159 Criminal Justice Act 1988.

Recent Developments

Facebook and contempt

British Broadcasting Corporation & Eight Other Media Organisations, R (on the application of) v F & D [2016] EWCA Crim 12 concerned an appeal brought pursuant to section 159 of the Criminal Justice Act 1988 against an order under section 4(2) of the Contempt of Court 1981 Act directed at the press and intended to control what had been described as vile social media comment posted on the Facebook pages of media organisations in a high profile and extremely difficult trial, in which two young teenage girls were charged with murder.

The day after the jury was empanelled the defence became aware of the fact that numerous adverse comments had been posted about the defendants by members of the public on the Facebook link to the *Hartlepool Mail's* reporting of the opening. They fell into one of three categories: there were those that were threatening to the accused, those which were derisive of their not guilty pleas, and those which were dismissive of the court process. The deputy editor of the *Hartlepool Mail* attended court on July 3, 2015 where he informed the court that it was his newspaper's intention to remove the Facebook post and thereby also the comments but he made it clear that other media organisations were posting links to their reports on Facebook which were generating similar comments.

A document was produced to the court containing over 500 comments to the links to reports of trial posted on the Facebook pages of the *Hartlepool Mail*, the *Daily Mirror*, the *Sunderland Echo*, *Breaking News Teesside* and *Sky News*. No one suggested that the linked news reports by any of these media outlets were anything other than fair, accurate, and reasonable reporting: the problem was the extreme comments to these posts left by members of the public. Because of these comments, the trial judge, Globe J made an order on July 3 under section 45(4) of the Senior Courts Act 1981 addressed at media organisations reporting the trial which directed them to:

1. 'Remove any posted comments on any media reports or facility to leave posted comments upon such reports from any website under their control that is publishing material relating to the trial.
2. Remove links from the said websites to any other websites (including Facebook and other social media networking organisations).
3. Prohibit the publication of posted comments on any media report of the trial on websites under their control.
4. Refrain from providing links from reports relating to the trial on those websites under their control to any other websites (including Facebook and other social networking organisations).

5. Refrain from issuing or forwarding tweets relating to the trial.'

On July 6, the prosecution and defence of F and D jointly made an application for the jury to be discharged on the ground that there was a real risk that the defendants could no longer have a fair trial at that time. Globe J had given the usual warnings to the jury at the beginning of the case about not researching the case online and being wary of the possibility of inaccurate reports of the case by the press, but he readily acknowledged that he had not foreseen the avalanche of public outrage recorded on social media in reaction to media reports. As a result, he agreed with counsel that it was impossible to continue with the trial because there was a real risk of injustice to the defendants and, accordingly, discharged the jury. A new trial was ordered at a different venue.

On July 7, Globe J received submissions from nine media organisations arguing that the court had no jurisdiction to make the July 3 order, that it was disproportionate and, of particular significance, it was unworkable. Both prosecution and defence responded that no practical solution to the risk of prejudice created by the provision of a platform for public comment during the trial had been offered, and that if, as asserted on behalf of the media organisations, the wording of the order of July 3 was unworkable, there could be no clearer argument for issuing an order pursuant to section 4(2) of the 1981 Act restricting publication of any report of the proceedings until the return of the verdicts in relation to both defendants or further order of the court. Globe J agreed and granted section 4(2) order. On July 8, the BBC wrote to Globe J on behalf of the nine media organisations and applied to him to revoke it.

On November 9, 2015, the judge accepted that none of the media organisations had published any of the comments which had been posted under the news reports or, as a consequence, breached the strict liability rule. He noted that the only undertaking that any was prepared to give was that the relevant organisation would comply with any request made during the trial for a prejudicial comment which had been posted to be hidden on a Facebook feed over which that organisation had control. Globe J did not consider that this offer was sufficient to dislodge what he had concluded was a not insubstantial risk of prejudice to the defendants.

Globe J went on to explain that counsel for the media organisations had told him that the only way to remove the comments link from a media organisation's profile page on Facebook was to remove the whole Facebook link to the media organisation itself: the comments link was built into the hardware and was part of the functionality of the platform. Thus, it was asserted that the only way of removing it was not to publish anything at all and none of the media organisations were prepared to do that.

Having analysed section 4 of the 1981 Act, in the light of the assertions as to the extent of what the media organisations said

was technically achievable and the limited undertaking they offered, he refused the application, postponing reporting until the conclusion of the trial.

The nine media organisations applied for leave to appeal that ruling under section 159 of the Criminal Justice Act 1988. They argued that on the basis that the media organisations were only publishing fair and accurate reports of the proceedings and that there was no risk of prejudice from those reports (as opposed to the comments that others posted underneath them which, themselves, they submitted did not give rise to the necessary risk of prejudice), there was no basis for restricting reporting under section 4(2) of the Act. This submission proceeded on the premise that the comments posted underneath the reports were not published by the media organisations responsible for the relevant reports. It was accepted that the media organisations could and should be treated as distributors of the posts so as to bring them within section 3(2) of the 1981 Act with the result that the exemption was subject to a duty of reasonable care. They further argued that, notwithstanding the findings of Globe J, the posts did not create a substantial risk of serious prejudice to the trial. If, however, the court did not accept that submission and, furthermore, accepted that, without an order, similar comments would continue to be posted on the organisations' Facebook pages, they recognised that, in the light of all that had passed, it would be difficult for the media organisations to avail themselves of the defence of innocent distribution contained within section 3(2) of the 1991 Act. On any showing, all had been put on notice as to the type of comment that would be posted.

The media organisations could not remove the link from their own websites to Facebook and could not prevent others from copying their coverage onto their own Facebook or other social media websites, adding such comment as they wished. It was however recognised that it would be possible to make an order that the media organisations do not place any report of the criminal trial on their respective Facebook profile page or pages. Furthermore, it was accepted that it would also be possible to disable the ability for users to post comments on their respective news websites on any report of the criminal trial published by the media organisations on their own websites.

So far as prejudice was concerned, this approach to the law was premised on basis that the court concluded that there was a substantial risk of serious prejudice if these posted remarks remained available and visible on the Facebook pages of the media organisations. The media submitted that there was no justification for so concluding, referring to the approach of the court on the robustness of jurors and their ability to decide cases in accordance with the judge's directions of law and, thus, ignoring all extraneous material but focussing only on the four corners of the evidence presented in court.

Sir Brian Leveson, delivering the judgment of the Court of Appeal, rejected these submissions. In relation to modern social media, comments were immediately available at the click of a mouse and although it was recognised that the printed pages of comments which had been put before the court were not reflective of what would be seen by searching a computer, the court did not accept (as was argued) that those trawling the internet would not go beyond the first page. There was a real risk that those interested in the subject matter would continue to scroll down comments, or potentially worse, search out the most 'likes' which were themselves likely to be the most inflammatory.

There was no doubt that the publication on social media of

comments of the type which caused Globe J to discharge the jury would create a substantial risk of serious prejudice which could easily threaten a second trial as it undermined the first. Testing it another way, it was inconceivable that a responsible media organisation would allow comments on their own websites of the type of which complaint was made: even if comments of any sort were permitted they would be moderated and excluded. There was no reason why the approach should be different when the report was copied onto the media organisations' Facebook or other social media site.

Accordingly the Court of Appeal ordered the media organisations, until verdicts in the criminal trial or further order (a) not to place any report of the criminal trial of F and D on their respective Facebook profile page or pages and (b) to disable the ability for users to post comments on their respective news websites on any report of the criminal trial published by the media organisations on their websites. They further directed that the order to be published to the Press Association so that other media outlets not specifically involved in or aware of these proceedings might take appropriate steps to ensure that they did not risk a breach of the 1981 Act on the basis that, in the light of the foreknowledge available from these proceedings, the defence of reasonable care provided by section 3(2) of the Act would not be open to them.

Reporting restrictions and terrorism

Guardian News And Media Ltd & Ors v R & Incedal [2016] EWCA Crim 11 concerned an appeal by various media organisations against reporting restrictions. On April 1, 2015 Nicol J made an order dismissing the application made on behalf of various media organisations that the reporting restrictions which applied during the trial of Erol Incedal be varied so as to permit the publication of reports of most, if not all, of what had taken place during hearings held in private but in the presence of accredited journalists. Various media parties appealed.

In summary, they submitted that following the conclusion of the trial against Incedal, there was no longer a significant risk or serious possibility that the administration of justice would be frustrated if the media could publish reports of the core of Incedal's trial. In consequence, there was no longer a continuing justification for the restrictions on reporting the trial that were imposed by the Court of Appeal's order of June 12, 2014. Alternatively, the publication of reports of parts of the core of the trial would not give rise to such a risk.

Incedal and his co-defendant, Mounir Rarmoul-Bouhadjar, were arrested on October 13, 2013 and charged with various terrorism offences. The proceedings against the defendants had been the subject of reporting and other restrictions from the outset. Following challenge the Court of Appeal varied to a limited extent the order made by Nicol J that the trial should be held *in camera* in that limited parts of the trial which it specified, could be dealt with in open court. In its open judgment, the Court of Appeal held that the case was exceptional and they were persuaded on the evidence before them that there was a significant risk – at the very least, a serious possibility – that the administration of justice would be frustrated were the trial to be conducted in open Court. The Court of Appeal was not persuaded it was necessary to anonymise the defendants, given its order that the core of the trial would be held *in camera*: The parts of the trial which the Court of Appeal directed should be heard in open court were the swearing in of the jury; the reading of the charges to the jury; at least a part of the judge's introductory

remarks to the jury; at least a part of the prosecution opening; the verdicts and if any convictions resulted, sentencing (subject to any further argument before the judge as to the need for a confidential annex).

The Court of Appeal further directed that a small number of accredited journalists might be invited to attend the 'bulk' of the trial (subject to being excluded when the few discrete matters were discussed in accordance with the certificates and the Crown's submissions) on terms which compelled confidentiality until review at the conclusion of the trial, and any further order.

In relation to the presence of the accredited journalists, the order as drawn up provided that up to 10 accredited journalists (as defined in the order) could attend the trial subject to terms as to confidentiality which the order also set out. The Court of Appeal said the attendance of accredited journalists would not make the trial unworkable. Their presence was not objectionable in principle, having regard to the fact that the selection of the journalists was not in the hands of the Secretaries of State but was to be resolved by the media parties themselves. Further, the accredited journalists' presence served to minimise the extent of the departure from the principle of open justice. The fact that accredited journalists could not report what took place was an inevitable corollary of the order for an *in camera* hearing; and would be the subject of review at the conclusion of the trial in any event.

On April 1, 2015, the judge dismissed the media parties' application that he should lift the reporting restrictions in whole or in part. He gave an open and closed judgment. Counsel and solicitors for the media parties were permitted to read the closed judgment, subject to undertakings that its contents should not be disclosed. The judge decided in summary, that nothing material had changed in view of Incedal's acquittal to justify the relaxation on the prohibitions advocated by the media parties, and that the application was rejected for reasons which he could only explain in his closed judgment.

In relation to the making public of more of the evidence, the media parties accepted that some of the evidence given in the trial should remain out of the public domain. They contended that the evidence on the core issues which the accredited journalists had heard should be made public as there was no longer, even if there ever had been, any proper justification for departing from the principles of open justice.

Lord Thomas of Cwmgiedd, CJ held that it was clear that there was a strong public interest in the evidence heard *in camera* in the presence of the nominated journalists being placed in the public domain: (i) The offences with which Incedal was charged were serious offences; (ii) He was sentenced to a significant term for the offence of which he was convicted; (iii) The evidence which might explain why he was acquitted on the more serious offence was not known to the public; (iv) As with all cases involving allegations of terrorism, there was a strong public interest in understanding the role of the counter terrorism branch of the police and of the Security and Intelligence Services, provided that what was made public did not materially compromise the effectiveness of their role or otherwise might damage national security; (v) Whereas the prosecution, the executive and those representing a defendant might all have the same or different reasons, depending on the circumstances of the case, for keeping matters out of the public domain, the press performed the vital role of protecting the public interest.

The prosecution relied on the certificates of the Secretaries of

State and other statements. The detail of the reasons why national security would be seriously affected by a decision to make public a significant part of what was heard *in camera* were in documents in part considered at hearings to which the media were present and in part in closed sessions.

The Court of Appeal was quite satisfied from the nature of the evidence for the reasons which they could only provide in a closed annex to their judgment that a departure from the principles of open justice was strictly necessary if justice was to be done. It was in consequence necessary that the evidence and other information heard when the journalists were present was heard *in camera*. Because of the nature of that evidence those reasons continued to necessitate a departure from the principle of open justice after the conclusion of the trial and at the present time. This had the consequence that any public accountability for matters relating to the prosecution could not be achieved through the press in its function as 'watchdog' of the public interest. However, as the issues related to terrorism and those charged with combatting it, it would be open to the Intelligence and Security Committee of Parliament to consider any issues it considered needed to be examined and for any public accountability to be achieved in that way.

Honest opinion

Wasserman v Freilich [2016] EWHC 312 (QB) before Sir David Eady concerned an issue as to whether the defendant should be allowed to rely upon a defence of honest opinion under section 3 of the Defamation Act 2013 (corresponding in many respects to the common law defence of fair comment). There was no plea of truth under section 2.

It arose following an application by the claimant in a libel action to strike out certain parts of the defence under CPR 3.4(2) on the basis that they did not disclose any reasonable grounds for defending the claim; or that they were an abuse of process or otherwise likely to obstruct the just disposal of the proceedings; and/or that there had been a failure to comply with rules of the court.

The claimant was the owner of Flat 4, Brinsdale Park, Brinsdale Road, London NW4 1TB. The flats in the block were managed by a company called Moreland Estate Management, which were operated by the defendant. A tenant in the block discovered a leak of water and left a note for the defendant who happened to be away on holiday at the time. The claimant was notified next day by a Moreland employee, who told her that it was believed that the source of the leak was in her flat. The claimant's position was that at all times she allowed the defendant's workmen access to her flat to do whatever was necessary, provided that they were qualified or under the supervision of a qualified person. A dispute arose as to the nature of the repair works that needed to be carried out to remedy the leak. An offending chain of emails began. These included an email to the claimant's insurer that the defendant was more than happy to testify in a court of law that what had happened was now edging on fraud and attempted fraud.

The common sting in the various natural and ordinary meanings pleaded was that the claimant was dishonest. Sir David Eady stated that had generally been regarded as a factual allegation. It had long been recognised that 'the state of a man's mind was as much a fact as the state of his digestion'. Accordingly, it was an allegation which in the context of libel was readily understood as being susceptible to a plea of truth under section 2 of the

2013 Act (as was the case with justification). It was not thought to be a matter of opinion: nor could one convert an allegation of dishonesty (or, for that matter, of murder or rape) into a matter of opinion by merely inserting in front of it a formula such as 'I believe ...' or 'she thinks ...'.

Here the defendant did not plead a defence under section 2. He did not seek to prove that the claimant was dishonest – or even that there were reasonable grounds to suspect her of dishonesty. On the other hand, the defendant did seek to add a plea of honest opinion under section 3 of the Act, specifically relating to dishonesty. So far, no other defamatory meaning had been identified. Practice Direction 53PD expressly provided that a defendant had to specify the defamatory meaning he sought to defend as honest opinion. Here, it was difficult to understand what the defamatory opinion or comment he wished to defend could possibly be.

The first condition to be fulfilled under section 3(2) was that the relevant statement must be one of opinion. If a statement was one of fact, therefore, the defence was not appropriate. If a statement could be proved to be substantially true, then a defendant had available the defence now provided for in section 2 (just as the common law defence of justification was available in the past). The question was bound to arise sometimes, however, whether a particular statement was in its context one of fact or opinion. This was naturally so, given the complexity and subtlety of language.

There had been some debate as to whether the appropriate dividing line between statements of fact and statements of opinion depended on whether the relevant defamatory allegation was verifiable or not. This was surely a matter of plain English. The word 'verifiable' meant 'capable of being proved to be true'. If a statement was capable of being proved to be true, then a defendant would now be able to rely on a section 2 defence (if the evidence was available). If, on the other hand, it was not capable of being proved to be true, it would follow that neither he nor anyone else could do so. In such circumstances, however, a defendant might well be able to take advantage of section 3: it was likely that the statement would be recognised by readers (and ultimately the court) as the expression of an opinion.

Here Sir David Eady held that these refinements did not need to be considered and the question was relatively straightforward to resolve. An allegation of dishonesty, fraud or attempted fraud would usually fall fairly and squarely on the side of fact rather than opinion. The same was true also where the allegation was of 'reasonable grounds to suspect'. Accordingly the pleading had to be struck out.

A further requirement, if honest comment were to be legitimately raised would be for the pleader to set out the facts upon which the opinion was based, or on the basis of which an honest person could have held that opinion. That too was now an express stipulation in the Part 53 Practice Direction. That had not been done so far, but it was immaterial since the defence failed at the first hurdle.

Factual basis for value judgement

In *Arztammer Fur Wien And Dorner v Austria* – 8895/10 (*Judgment (Merits and Just Satisfaction) Court (Fourth Section)*) [2016] ECHR 179 (February 16, 2016) the European Court of Human Rights held that there had been no violation of article 10 of the Convention.

The applicants were the Vienna Chamber of Medical Doctors and Walter Dorner, who was the chamber's president. The applicants complained about decisions by the domestic courts prohibiting them from making certain negative statements about a private company. In January 2007 Mr Dorner published a letter on the chamber's website, which was also sent to all members of the chamber, in which he referred to reports that a private company, F, was planning to provide radiology services. He warned of the risk that doctors might become mere employees of 'locust' companies such as F and announced that the chamber would make use of all legal and political means available to stop such a disastrous development.

Following a complaint by F the Vienna Commercial Court issued an injunction, in February 2007, prohibiting the applicants from repeating the statement that the company was ruthless towards third parties, in particular medical professionals, from referring to the company as a 'locust' company or fund, and from stating that the provision of radiology services by the company was a disastrous development. The appeal court amended the injunction so that the applicants were no longer prohibited from referring to F providing of medical services as a disastrous development. The lower courts' decisions were upheld by the Supreme Court. In the main proceedings the Vienna Commercial Court confirmed the prohibitions in July 2008. Furthermore, the applicants were ordered to publish the operative part of the judgment on the chamber's website, where it was to be displayed for 30 days, and in the chamber's printed newsletter. The judgment was eventually upheld in July 2009. The courts found that while the statements in question did not constitute defamation pursuant to the Civil Code, they had been made in a commercial context and not in the chamber's capacity as an official authority – the chamber and F being competitors – and had been in violation of the Unfair Competition Act. The term 'locust' had a negative meaning, leading to the unethical general vilification of a competitor. The applicants complained that the domestic courts' decisions had violated their rights under article 10 (freedom of expression) of the European Convention on Human Rights.

The court noted that the domestic courts took the statement of January 2007 into consideration in its entirety, and found that the statement was made in the clearly economic context of competing medical practices and capital companies providing the same services. They acknowledged that where a competitor, even for economic purposes, took part in a debate of public interest, freedom of expression had to hold more weight with regard to the balancing exercise. However, the term 'locust' was almost exclusively loaded with negative meaning, which led to an unethical general vilification of a competitor. The word used gave the reader the impression that F had already demonstrated unethical conduct which harmed the interests of doctors and patients. Therefore, the domestic courts judged the relevant statement to be one of fact. The statement was also likely to damage the F's commercial interests, and had not been proved to be true.

The court considered that there was no need to further clarify whether the present statement was one of fact or a value judgement, since a sufficient factual basis for it was needed in any case. For a company which offered medical services, the accusation that it acted as a 'locust' (which, as could be seen from the context of the applicants' letter, also implied that F or similar companies placed economic interests above those of its patients) was a particularly serious one which affected its reputation. Thus, even if the applicant had intended to make that statement in the context of a wider debate on an issue of public concern, he had to have a solid factual basis on which to base that allegation.

In the domestic proceedings, the Austrian courts concluded that there was no such factual basis, and the applicant had likewise not provided any persuasive argument substantiating his allegations. Neither the fact that the shares in F were owned by other companies limited by shares and that one of those shareholders was managed by a private-equity fund, nor the fact that financial resources for expansion were raised by debenture provided a factual basis for the unethical conduct typically associated with 'locust' corporations. In addition, the fact that doctors were employees within F did not provide a factual basis for the second applicant's allegations. The general remarks by the second applicant concerning the future impact of the growing popularity of companies providing medical services were not related to any actions on the part of F; therefore, they could not provide a factual basis for his allegations against that company. Accordingly, the court arrived at the conclusion that the prohibition imposed on the second applicant was based on 'relevant and sufficient' grounds.

The court found that the interference with the exercise of the second applicant's right to freedom of expression was necessary in a democratic society, within the meaning of article 10 of the Convention, in order to protect the reputation and rights company F. There had therefore been no violation of article 10 of the Convention.

Injunction and change of circumstances

PJS v News Group Newspapers Ltd [2016] EWCA Civ 393 concerned an application to set aside an interim injunction, which banned publication of the claimant's extra-marital ventures. The issue was whether recent coverage of the relevant information, both overseas and on the Internet, should cause the court to discharge its previous order.

The claimant was in the entertainment business and was married to YMA, who was a well-known individual in the same business. They had young children. In 2007 or 2008 the claimant met AB. They had occasional sexual encounters, starting in 2009. AB had a partner, CD. In a text message exchange on December 15, 2011 the claimant asked if CD was 'up for a three-way'. AB said that CD was. Accordingly, the three met for a three-way sexual encounter, which they duly carried out. After that encounter the sexual relationship between the claimant and AB came to an end, but they remained friends for some time. In or before early January 2016, AB and CD approached the editor of the *Sun on Sunday*. They told the editor about their earlier sexual encounters with the claimant. The editor proposed to publish the story and notified PJS that he would do so. The claimant took the view that any publication of that material would be a breach of confidence and an invasion of privacy. Accordingly, he commenced proceedings.

At a hearing on January 22, 2016 the Court of Appeal, allowing an appeal, issued an injunction restraining publication of the names of PJS, AB or CD or details of their relationship. The injunction was effective for eleven weeks. Then things changed. On April 6, 2016 a widely read magazine in the USA published an account of PJS's sexual activities, naming those involved. Over the next few days, other publications in America, Canada and Scotland published similar articles. As a result of those publications details started to appear on numerous websites, identifying PJS and YMA by name. The claimant's solicitors had been assiduous in monitoring the internet and taking steps, wherever possible, to secure that offending information was removed from URLs and web

pages. But in truth that was a hopeless task. The same information continued to appear in new places. Also tweets and various forms of social networking ensured that the material circulated freely. At the same time newspapers in England and Wales reported the contents of the redacted judgment, vigorously complaining that they were banned from naming the participants. Against that background, NGN issued an application to set aside the injunction.

The question before the court was whether there had been a change of circumstances such as to warrant setting aside the previous order, notwithstanding the limited public interest in the proposed story. This required a fresh consideration of HRA section 12(3) and (4) against the backdrop of the now widely available material, none of which was in the public domain when the interim injunction was granted.

Lord Justice Jackson stated that the submission that the present case had stimulated a public debate about privacy injunctions, as a change of circumstance relied upon by NGN could be discarded swiftly. It could not be permissible for the media to stir up a debate about an injunction to which they were subject and then rely upon that debate as a ground for setting aside the injunction.

HRA section 12(3) required that an interim injunction be refused unless the court was satisfied that the applicant was likely to establish at trial that the publication should not be allowed. The court had to have particular regard to the importance of the Convention right to freedom of expression. Among the matters to which the court had to have regard was the extent to which the material had, or was about to, become available to the public. This involved a fact-sensitive assessment as to (a) what had occurred, (b) what would occur prior the trial and (c) what the result would be at trial.

It was necessary to consider separately the claimant's claims based upon confidentiality and misuse of private information. Claims for confidentiality generally failed once information had passed into the public domain. It was clear that the law extended greater protection to privacy rights than rights in relation to confidential material. However, the extent of that enhanced protection was less clear.

Lord Justice Jackson stated that the correct analysis was that a claim for misuse of private information could and often would survive when information was in the public domain. It depended upon how widely known the relevant facts were. In many situations the claim for misuse of private information survived, but was diminished because that which the defendant published was already known to many readers. The publication was an invasion of privacy and harmful for the claimant, but was not as egregious as it would otherwise be. That did not deprive the claimant of his claim for damages, but it weakened his claim for an injunction. This was for two reasons. First, the article 8 claim carried less weight, when the court carried out the balancing exercise of article 8 rights as against article 10 rights. Second, injunctions were a discretionary remedy. The fact that material was generally known was relevant to the exercise of the court's discretion.

It was important to note that HRA section 12 did not affect the existence of the claimant's article 8 claim nor did it provide any defence to the tort of misusing private information. The effect of section 12 was twofold. First, it enhanced the weight which article 10 rights carried in the balancing exercise. Secondly, it raised the hurdle which the claimant had to overcome in order to obtain an interim injunction.

Lord Justice Jackson was of the view that the story which NGN proposed to publish was likely to be a breach of the claimant's article 8 rights. What had changed was the weight which the claimant's article 8 rights carried, when balanced against NGN's article 10 rights. Also the fact that material was widely known had to be relevant to the court's discretion.

The next question to consider was the effect of a media 'campaign' against a particular injunction. There was an important difference between succumbing to disobedience or defiance on the one hand, and accepting that there had been and was likely to be extensive dissemination of private material on the other. In the latter type of case, it would be necessary to consider, on the particular facts of the case, whether the order should be maintained notwithstanding the dissemination of the material. In the present case the Appellant did not allege that the media had acted in breach of the injunction. So this was not a case of 'disobedience'. It did however submit that a large number of people had acted 'defiantly'. The difficulty with that argument was that the Internet and social networking had a life of their own. Furthermore, the court had little control over what foreign newspapers and magazines might publish.

There were many people who had no interest in the sex lives of celebrities. But those who were interested in such matters would by now have read press reports of this case. They would have had no difficulty in finding out who PJS and YMA were. Ultimately

the court had to make an assessment under HRA section 12(3) of whether the claimant was 'likely' to obtain a permanent injunction restraining publication at trial. The court had to do so paying particular regard to the factors set out in HRA section 12(4)(a)(i) and (ii).

In the situation which now prevailed, the claimant was likely to establish a breach of ECHR article 8. But, notwithstanding the limited public interest in the proposed story, Lord Jackson did not think that the claimant was 'likely' to obtain a permanent injunction. That was because: (i) Knowledge of the relevant matters was now so widespread that confidentiality has probably been lost. (ii) Much of the harm which the injunction was intended to prevent has already occurred. (iii) It would not be a shock revelation, as publication in January would have been. (iv) If the interim injunction stood, newspaper articles would continue to appear re-cycling the contents of the redacted judgment and calling upon PJS to identify himself. This would continue up to the trial date. (v) The need to balance article 8 rights against article 10 rights meant that there was a limit to how far the courts could protect individuals against the consequences of their own actions. (vi) As a result of recent events, the weight attaching to the claimant's article 8 right to privacy has reduced. It could not now be said that when the day of trial came, PJS's article 8 right was likely to prevail over NGN's article 10 right to freedom of expression, such as to warrant the imposition of a permanent injunction. (vii) Finally, the court should not make orders which were ineffective. v

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