

**UK DEFAMATION LAW UPDATE**

**DEVELOPMENTS IN QUALIFIED PRIVILEGE, ONLINE LIABILITY AND PRIVACY**

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QUALIFIED PRIVILEGE

***George Galloway MP v Telegraph Group Ltd***

[161] The defence of *Reynolds* qualified privilege has been considered in some depth in recent cases, and the concept honed. In December 2004 George Galloway, an ex-Labour MP, was awarded £150,000 in libel damages from *The Daily Telegraph* after the newspaper published allegations that he was in the pay of Saddam Hussein's regime.<sup>2</sup> The articles were published by *The Daily Telegraph* in April 2003, just over a month after the invasion of Iraq by the coalition forces.

Eady J concluded that the articles meant that: (1) Galloway had been in the pay of Saddam Hussein's regime and had secretly received at least £375,000 a year; (2) he had diverted money from the Oil for Food programme so depriving Iraqi citizens, whose interests he claimed to represent, of food and medicine; (3) he had used the Mariam Appeal as a front for his own financial advantage; and (4) what he had done amounted to making money from enemy regimes — that is, treason.

[162] *The Daily Telegraph* did not attempt to defend the allegations as true. Its only defence was that of *Reynolds* qualified privilege. It claimed that its coverage of the story had been no more than 'neutral reportage' of documents discovered by a reporter in the badly damaged Foreign Ministry of Baghdad, which it believed were authentic. Reportage refers to the neutral reporting of attributed allegations, rather than their adoption by a newspaper. It was successfully relied upon as a defence in the *Al Fagih* case.<sup>3</sup> In addition, *The Daily Telegraph* argued that it had a duty to report the allegations contained in the Baghdad documents because the public had a right to know their contents, whether true or false.

Eady J did not uphold the defence of qualified privilege or 'responsible journalism', as it has come to be known. He considered the ten criteria for the defence as set out by Lord Nicholls in *Reynolds v Times Newspapers Ltd*.<sup>4</sup> They include the seriousness of the allegation, their source, the steps taken to verify it, the urgency of the matter, whether the claimant was asked to comment and give his or her side of the story and the tone of the article.

Although Galloway had been interviewed by telephone prior to publication, he was not given an opportunity to read the Iraqi documents beforehand, nor were they read out to him in full. Neither was he given an opportunity to respond to the allegation of personal enrichment. In the circumstances, the judge held that the newspaper, did not have a social or moral duty to make the allegations about Galloway.

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<sup>2</sup> [2004] EWHC 2786 (QB).

<sup>3</sup> *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634.

<sup>4</sup> [2001] 2 AC, 127.

The Judge also held that the newspaper's reporting was not neutral. It did not merely adopt the allegations contained in the documents. Instead *The Daily Telegraph*, 'embraced them with relish and fervour.'

Eady J made a damages award of £150,000 in order to restore Galloway's reputation. The award would have been even greater but for the downturn in the level of libel damages in the UK in recent years. The allegations were serious enough, however, for the award to be at the high end of the bracket. Galloway's treatment in court aggravated the situation and increased the damages payable.

The decision underlines the danger of relying solely on a defence of qualified privilege, that is without pleading justification. It also makes it clear that, in order to rely on the qualified privilege defence successfully the media must comply fully with Lord Nicholls' criteria as first set out in *Reynolds*.

The case is being appealed.

### ***Armstrong v Times Newspapers Ltd***

The courts again found in favour of the claimant when a newspaper pleaded *Reynolds* qualified privilege. Lance Armstrong, the five times Tour de France winner, was granted a preliminary victory in his libel proceedings against Times Newspapers Limited and the sports journalist David Walsh.<sup>5</sup> The claim concerned an article published in *The Sunday Times* in June 2004 about whether or not he had taken performance-enhancing drugs. The article drew on a book about Armstrong entitled *LA Confidential* written by Walsh and a French journalist. Ruling against *The Sunday Times*, Eady J struck out the lowest level of meaning of the article contended for by the newspaper as well as its *Reynolds* qualified privilege defence. The decision is one in a long line of judgments by Eady J finding against *Reynolds* qualified privilege.

The newspaper had sought to advance a plea of justification on the basis that the article meant either that there were grounds to investigate whether Lance Armstrong had taken performance-enhancing drugs or there were reasonable grounds to suspect that he had done so. Armstrong argued that the article was incapable of bearing the lower meaning and that it ought to be struck-out. He argued that the article meant that he was guilty of having taken performance-enhancing drugs or at least that there were reasonable grounds to suspect him of guilt. The three levels of meaning in play in the proceedings are [163] sometimes referred to as *Chase* level meanings, after the 2003 decision in *Chase v News Group Newspapers Ltd*.<sup>6</sup> They are:

- (1) guilt or serious grounds to suspect;
- (2) reasonable grounds to suspect;
- (3) grounds to investigate.

The general rule in libel proceedings is that the meaning of the words complained of is a matter for the jury to decide. However, if a party argues that the words are incapable of bearing the meaning pleaded by the other side, it is for the judge to decide whether this is the case. In doing so he or she may exclude a meaning only if it can be characterised as so far-fetched that a jury, properly directed, would be perverse to uphold it. The court will look for the overall impression conveyed by the article in

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<sup>5</sup> [2004] EWHC 2928.

<sup>6</sup> [2002] EWCA Civ 1772.

question and will have in mind that readers, while not avid for scandal, can read between the lines.

Eady J found that:

... the transparent device of peppering the article with the ‘questions’ formula is not sufficient to diffuse the powerful impact of such assertions as ‘... to do so is probably impossible’ and ‘... a man who has won five Tours de France in a row must have succumbed to the pressure of taking drugs’.

He found that the article was not a call for an inquiry to be set up by a sports body to investigate whether there is drug-taking in the sport generally and that the article leaves readers ‘with the impression that Armstrong’s denials of drug-taking beggar belief and are to be taken with a pinch of salt’. Accordingly, he held that the words carried at least a *Chase* level 2 meaning, that is that there are reasonable grounds to suspect that Armstrong has taken performance-enhancing substances and he struck-out the newspaper’s level 3 meaning.

The Judge made the general point that employing the formula of raising questions rather than making direct accusations is a transparent device which will not protect newspapers from the overall impression created by an article. Further, the use of phrases such as ‘there are those that fear that ...’ is similarly ineffective; even in cases where the words complained of are capable of bearing a *Chase* level 3 meaning. The repetition rule still applies, so the fact that the article merely repeated extracts from a book did not assist the defendants. In considering whether the words complained of constituted neutral reportage — the reporting of allegations in a way which does not adopt them as true — the court should determine whether, as a matter of public policy, journalists should be entitled to rely on this in their defence or whether they are simply seeking to by-pass the constraints of the repetition rule.

Armstrong was also successful in his application to strike out the newspaper’s *Reynolds* qualified privilege defence. Notwithstanding the Judge’s recognition that in determining this issue all the relevant assumptions had to be made in the defendants’ favour, in testing the defence against the 10 non-exhaustive criteria for ‘responsible journalism’ identified by Lord Nicholls in *Reynolds*, he found that *The Sunday Times* had not taken any independent steps to verify the information contained in the article, nor had it made any attempt to contact Armstrong or to report his version of events. The tone of the article was ‘sensational’ and not ‘measured, neutral reportage’. And, even though the author of the book had contacted Armstrong, he had not put all of the allegations to him.

[164] Repeating his familiar mantra that topicality or commercial expediency should not be conflated with urgency, Eady J found that, while drug-taking in sport is clearly a matter of public concern, *The Sunday Times* had not been under a duty to publish these allegations about the Claimant at the time it did and without at least affording him an opportunity to give a measured response to the charges. In sum, he found that the duty-interest test or the right to know test had not been satisfied and, accordingly, that the *Reynolds* qualified privilege defence had no realistic prospect of success.

It is strange that in concluding:

I cannot see that the Defendants could be said to be under a duty to publish allegations to the effect that Mr Armstrong had probably taken performance-enhancing drugs or that, given his prowess in the Tour de France, he ‘must’ have done so...

Eady J appears to have hinged his finding on a *Chase* level 1 meaning of the article, ignoring its equally possible level 2 meaning.

This case is being appealed.

### ***Jameel v Wall Street Journal Europe***

The Court of Appeal's decision on the *Wall Street Journal's* appeal from the rejection of its *Reynolds* qualified privilege defence in *Jameel & Anor v Wall Street Journal* saw libel law survive an attack on two of its fundamental principles and the finessing of *Reynolds* privilege, although two key questions on *neutral reportage* and a journalist's subjective belief in their article are left unanswered.<sup>7</sup>

In February 2002, the *Wall Street Journal Europe* (WSJE) published an article entitled 'Saudi Officials Monitor Certain Bank Accounts Focus Is On Those With Potential Terrorist Ties'. It claimed that, at the request of US law enforcement agencies, the Saudi Arabian Monetary Authority was monitoring bank accounts associated with some of the countries most prominent businessmen 'in a bid to prevent them from being used wittingly or unwittingly for the funnelling of funds to terrorist organisations'. The Jameel company, run by Jameel, was mentioned in the article as being on a list of businesses whose accounts were being monitored.

Jameel and his company sued WSJE and the author of the article, James Dorsey, for damages in libel on the basis that the article meant that they were reasonably suspected of having terrorist ties and funnelling funds to terrorist organisations. The jury found in their favour and awarded them damages of £30,000 and £10,000, respectively. The majority of Dorsey's evidence about his sources for the article and his attempts at verification was rejected by the jury and, in the circumstances, the defendants' *Reynolds* privilege defence failed. There was no plea of justification.

The defendants appealed against the decision on various grounds relating to their *Reynolds* defence and by challenging two principles of English libel law, the presumption of falsity and the presumption of damage.

The Court of Appeal's findings on key elements were as follows:

Has the test for *Reynolds* privilege been reduced to the question of whether the publication of the article in question constituted 'responsible journalism'? No. This is too imprecise. There are two elements to the test: (1) the subject matter of the article must be in the public interest; and (2) the article must be the product of responsible journalism.

Does the presumption of falsity apply to all questions which the jury must answer, including those relevant to *Reynolds* privilege? No. It is appropriate for the jury to apply the presumption when considering questions of liability and damages but not when considering the issues of fact relevant to a *Reynolds* defence. Eady J had misdirected the jury in this respect but his misdirection was not found by [165] the Court of Appeal to have been sufficiently material to warrant a re-trial.

Should the Judge have obtained from the jury a definitive meaning of the words used? No. The choice was between 'reasonable grounds to suspect' and 'grounds to investigate'. Had *Reynolds* privilege turned on whether the words bore the more or the

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<sup>7</sup> [2005] EWCA Civ 74.

less serious meaning it might have been necessary to invite the jury to choose between the two, but it did not.

Is a journalist's belief in the truth of the words complained of relevant to *Reynolds* qualified privilege? In some cases, it will be. In this case the defendants argued the Jamaican case of *Bonnick v Morris*<sup>8</sup> in which the Privy Council acknowledged that the reporter did not appreciate that her article had a defamatory meaning with the result that she was not found to have acted irresponsibly in publishing it. While the Court of Appeal acknowledged that statements made in, and comments made about, *Bonnick* 'suggest that it may be necessary or at least admissible for a defendant to allege and prove subjective belief in order to establish a defence of *Reynolds* privilege', it agreed with Eady J that in this case no responsible journalist could have ignored the fact that the article was capable of bearing a defamatory meaning. Dorsey could not, therefore, have reasonably believed that the article was not defamatory and *Bonnick* was not relevant to the case.

The defendants also contended on appeal that the article constituted 'neutral reportage' of the kind the Court of Appeal found to be protected by qualified privilege in *Al Fagih*. The Court of Appeal raised the following important questions:

Does a doctrine of neutral reporting exist in English law? If qualified privilege can attach to neutral reporting, does the report have to be accurate, or is it enough that the publisher believes that the report is accurate?

In *Al Fagih*, publication was found to be protected by qualified privilege even though the publisher (a) did not believe the allegations it was publishing and (b) had not taken any steps to verify them. The defence was founded on the fact that the allegations were made by a third party and were reported 'fully, fairly and disinterestedly'.

In this case, the defendants were in a similar position in that they had admitted that they did not believe that the Jameel company was in any way connected with terrorism and they had taken no steps to verify that it was. However, because the defendants had failed to make clear that they relied on the *reportage* defence at trial, the Court of Appeal did not consider it necessary to deal with it. The two questions it raised were, therefore, sadly left unanswered.

It is regrettable that the defence was not fully developed at trial because the Court of Appeal seemed to recognise the possibility that *Reynolds* privilege may attach to the *neutral reportage* of allegations made by a third party, even if the publisher does not believe in their truth.

The defendants also sought to argue that the presumption of falsity (the principle of libel law that, in the absence of a plea of justification, the words complained of are presumed to be false), infringes Arts 6 and 10 of the European Convention on Human Rights. The Court of Appeal refused to entertain the argument mainly because it was raised too late. However, the issue was recently considered by the European Court of Human Rights in the *McLibel* case and dismissed.<sup>9</sup> It is highly unlikely, therefore, that it would have succeeded before the Court of Appeal.

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<sup>8</sup> [2002] UKPC 31.

<sup>9</sup> See *Steel and Morris v UK* (unreported, ECHR, 15 February 2005).

[166] Finally, the defendants appealed on the basis that the principle of presumption of damage, another fundamental tenet of libel law, is also contrary to Art 10 of the Convention. They submitted that if English law was to be compatible with Art 10 it had to require claimant corporations or, in the least, foreign claimant corporations, to prove special damage as an essential element in their cause of action in libel. The Court of Appeal disagreed. It found that a requirement to prove special damage would leave many an injured corporation without remedy. As to foreign corporations, it found no merit in distinguishing them from domestic corporations. Indeed, to do so would be likely to constitute discrimination and in itself infringe Convention rights.

Although the defendants failed to overturn Eady J's finding against their *Reynolds* defence, the Court of Appeal's judgment does not undermine *Reynolds*. On the contrary, the points made by the Court of Appeal about pleading reasonable and honest belief, the non-applicability of the presumption of falsity in respect of *Reynolds* questions of fact and the jury's findings of fact against the reporter not being fatal to his *Reynolds* defence, might assist publishers in their reliance on the defence in future. It is disappointing that the decision leaves key questions about *neutral reportage* open.

#### ONLINE LIABILITY

##### **Online liability more likely**

In late 2004, Lord Robertson collected £25,000, his legal costs, and an apology from *The Sunday Herald* as a result of a libellous posting on its website — all this despite the fact that the posting was made by a reader, the newspaper did not vet such postings and had no idea it was there, and it was removed as soon as Lord Robertson complained.

This appears to fly in the face of s 1 of the *Defamation Act 1996*. The so-called internet defence caused a stir when it came into force a few years ago and for the first time put on the statute books a defence of innocent dissemination. Provided they acted promptly to remove the offending material when put on notice of its existence, those hosting online discussion forums would not be liable for their content. Recent developments have shown matters not to be so straightforward.

First, the defence is not available to anybody who has exercised 'editorial control' over the material, for example by vetting contributions before they are posted. Second, the website operator cannot simply turn a blind eye to postings. To be able to rely on the s 1 defence it must also be able to demonstrate that it has taken 'reasonable care', and it could not reasonably have known that anything it did 'caused or contributed to publication of a defamatory statement'. Doing enough to satisfy the reasonable care requirement while not straying into the territory of exercising editorial control can be something of a tightrope act, but it might for example include establishing user rules governing the content of contributions and might even stretch to monitoring contributions after they have been posted and deleting the worst offenders.

Moreover, there is another difficulty — for newspapers in particular — with the s 1 defence. Also excluded from relying on the defence is a 'commercial publisher' of the statement in question. A commercial publisher is defined as 'a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business'. Any newspaper group (as

opposed to, say, an ISP) is therefore likely to be a commercial publisher. The only question is whether the material in question was issued 'in the course of that business'.

A case could therefore turn on how the website in question is operated. For example, if it is subscriber access only, then it is providing a revenue stream and the statement is probably being issued in the course of the newspaper's business. Even if access is free to users, the newspaper may be selling banner advertising on the website, or it may in any event be said by a claimant that the website forms part of the marketing activity of the business. The lesson is clear: any newspaper group which gives the public unfettered access to its virtual columns does so at its peril.

### **[167] *Yousef Jameel v Dow Jones & Co Inc***

It is now well established that defamatory material published on a website is actionable in the UK, even if the servers on which the website is hosted are abroad. Provided that the victim of the libel has a reputation to defend in the UK, he or she will be entitled to sue in the English courts.

This was the scenario in the recent case of *Yousef Jameel v Dow Jones & Co Inc*,<sup>10</sup> in which the online version of *The Wall Street Journal*, published by Dow Jones, had incorrectly alleged that Jameel had been, or was suspected of being, involved in funding Al Qaeda and supporting Osama Bin Laden, as discussed above. Accordingly, Jameel brought libel proceedings in the English High Court on the basis that he had a reputation to defend in the UK.

The article in question had been on the website for four days, following which it was moved to the website's archive, where it remained for four months. However, it subsequently transpired that during this period the article had been accessed by only five people in the UK, three of whom were Jameel himself, his solicitor, and one of his advisers.

As a matter of defamation law, damage is presumed. In this case, however, *The Wall Street Journal* argued that publication in England and Wales was so very limited that no substantial tort had been committed in this jurisdiction and that the proceedings were therefore an abuse of process.

The Court of Appeal took the view that, following the introduction of the new *Civil Procedure Rules* in 1999 and the coming into force in 2000 of the *Human Rights Act 1998*, it had to consider whether it would be an appropriate and proportionate use of judicial and court resources to allow the case to proceed, notwithstanding that technically Jameel had a substantive claim. Having regard to the fact that any damage done to the claimant's reputation in England would have been minimal, the Court decided that the costs of taking the case to trial would be out of all proportion to what the claimant would achieve by way of vindication of his reputation, and indeed by way of damages (which would almost certainly have been nominal). The claim was therefore struck-out.

This is a significant development in the law governing liability for website content. It will be relevant not only for websites hosted abroad, but also to ISPs or website

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<sup>10</sup> [2005] EWCA Civ 75.

operators in the UK where a complaint is made of defamatory material, which in all likelihood has only been seen by a very limited number of people.

In those circumstances, the website operator would be well advised to put the claimant to proof as to the extent of publication. Or, if the operator has the requisite software, to take the initiative by drawing to the complainant's attention as soon as possible the negligible number of hits received on the page in question.

## PRIVACY

### *Campbell v Mirror Group Newspapers Ltd*

Although the UK remains without any overarching privacy laws, there have been a number of key cases which signify the development of the concept in the minds of the judiciary. In May 2004, the House of Lords overturned the Court of Appeal's decision that *The Mirror* was justified in publishing certain private information about Naomi Campbell.<sup>11</sup> The case concerned the publication in February 2001 of a report about Campbell's drug addiction illustrated by a covertly taken photograph of her leaving a Narcotics Anonymous meeting in Chelsea. Campbell [168] claimed damages for breach of confidence and compensation under the *Data Protection Act 1998* (UK). The majority in the House of Lords allowed Campbell's appeal and reinstated a £3,500 damages award.

Five elements of information in the article were identified: (1) that Campbell was a drug addict, (2) that she was receiving treatment for her addiction, (3) that she was receiving treatment with Narcotics Anonymous, (4) details of her treatment, and (5) the photograph of Campbell leaving a Narcotics Anonymous meeting. Campbell conceded that because she had lied publicly that she never had a drug problem, *The Mirror* was entitled to publish that she was an addict and also that she was attempting to deal with it (items 1 and 2). However Campbell claimed that items 3, 4 and 5 were private information which *The Mirror* should not have disclosed.

The majority confirmed that publication of elements 3, 4 and 5 invaded Campbell's right to privacy for which she was entitled to damages for breach of confidence. These details were private and confidential and related to Campbell's physical/mental health and the treatment she was receiving. The publication of these details might harm Campbell and adversely affect her attendance at and participation in therapy. The assurance of privacy was an essential part of Narcotics Anonymous treatment. In the view of the majority judges, publication of these elements risked Campbell's recovery from drug addiction while it was still at a fragile stage.

It was unanimously agreed that an individual's right to privacy under Art 8 of the European Convention of Human Rights, had to be balanced against the media's right to freedom of expression under Art 10. Neither Art 8 nor Art 10 had any pre-eminence over the other. The House of Lords confirmed that these values are as much applicable in disputes between individuals or between individuals and a non-governmental body (such as a newspaper) as they are in disputes between individuals and a public authority.

The court had to apply the test of whether publication pursued a legitimate aim and whether the benefits achieved by publication were proportionate to the harm done by

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<sup>11</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] 2 WLR, 1232.

the interference with the right to privacy. The publication of the photograph was important to the conclusion reached by the majority judges as any person in Campbell's position would have been distressed on seeing the photograph published in *The Mirror*.

The Court of Appeal and the dissenting judges, Lords Nicholls and Hoffman, held that items 3, 4 and 5 were only peripheral details, part of the journalistic package which added colour and credibility to the main story that Campbell was a drug addict, without increasing the breach of confidence. These details were therefore, in the view of the minority judges, within the margin of appreciation which must be given to any journalist. Lord Hoffman considered that although it would have been possible for *The Mirror* to publish the article without the pictures, they were an essential part of the story from a journalistic point of view. Publication of the photographs was therefore also within the margin of editorial judgment.

The then *Mirror* editor, Piers Morgan, commenting on the judgment said it was a good day 'for lying drug abusing prima donnas who want to have their cake with the media, and the right to then shamelessly guzzle it with their Cristal champagne.' But Campbell has had the last laugh and the *Mirror* has been left with an estimated total legal costs bill of more than £1 million.

### ***Von Hannover v Germany***

The law relating to privacy has been further developed in a European Court of Human Rights (ECHR) decision which will bind the UK courts. *Von Hannover v Germany*<sup>12</sup> is a case which may radically alter the extent to which the tabloid press are permitted access to the private lives of celebrities.

Princess Caroline of Monaco lives mainly in France. French law requires her prior consent for the publication of any photographs there which do not show her at an official event. However other countries such as the UK or Germany have no such restriction, and on several occasions Princess [169] Caroline had applied unsuccessfully to the German courts in respect of the publication in the German magazines, *Bunte*, *Freizeit Revue* and *Neue Post* of paparazzi photographs showing her as she went about daily activities: shopping, skiing, eating in restaurants and tripping over an obstacle at the Monte Carlo Beach Club.

On 15 December 1999 the German Federal Constitutional Court restrained the publication of a small number of photographs in which she appeared with her children. However under German law, Princess Caroline herself was a 'figure of contemporary society *par excellence*' and was entitled to privacy only if she could show that she had retired to a 'secluded place' with the 'objectively perceptible aim of being left alone', so publication of the remaining photos was permitted.

The ECHR held unanimously that there had been a violation of Art 8. In balancing the protection of private life against the freedom of expression guaranteed by Art 10 of the Convention, the decisive factor lay in assessing the contribution that the publication of private information made to a debate of general public interest. The public has a right to be informed, which is an essential right in a democratic society that, in special circumstances, can even extend to aspects of the private life of public figures. But in this case the photographs made no contribution to a debate of public

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<sup>12</sup> (2004) (ECHR, Application No 59320/00).

interest as Princess Caroline exercised no official function and the sole purpose of publishing the photographs was to satisfy readers' curiosity about the Princess's private life. The photographs had been taken without her knowledge or consent and in some cases in secret.

Photographs of her going about her daily activities in public places fell within her private life. The court acknowledged that

... photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution.<sup>13</sup>

The ECHR reiterated the fundamental importance of protecting private life 'from the point of view of the development of every human being's personality' and everyone including people known to the public had to have a legitimate expectation that his or her private life would be protected.

The ECHR found that the criteria on which the German court based their decisions were not sufficient to protect the applicant's private life effectively. The law must be sufficiently certain for an individual to know when they are in a protected sphere and when they must expect interference so that they know what behaviour to adopt.

Whilst the judgment of the ECHR was unanimous, two judges expressed concern about the implications, arguing that whether or not the Princess had a 'reasonable expectation of privacy' in specific circumstances was a better test than whether or not the applicant was a 'public figure'.

The *Peck*<sup>14</sup> and *Campbell* cases have already made the activities of tabloid journalists more difficult. It is apparent from this judgment that whilst the private lives of politicians and celebrities seeking publicity may remain fair game, greater caution will need to be exercised in respect of the activities of those who do not exercise official functions.

### **[170] Injunction against Jagger CCTV footage**

In the most recent instalment in the progression of privacy law Bell J has ruled that Elizabeth Jagger had a 'legitimate expectation of privacy' when she enjoyed a sexual encounter with Calum Best just inside the front door of a Soho nightclub.<sup>15</sup> Jagger brought the case after still pictures taken from CCTV footage were published in *The News of the World*. She brought the claim in copyright (having taken an assignment from the nightclub), misuse of private information and breach of data protection rights. She did not seek to prevent publication of any information in verbal form but only the recording itself or stills from the recording.

The defendants were the suspended General Manager of the nightclub and 'the person or persons who acquired or made a copy of a CCTV recording ... and supplied it or images taken from it to *The News of the World* newspaper.' The case involved a particularly blatant breach of the *Data Protection Act 1998* and of the Information Commissioner's Code of Practice on the use of CCTV cameras.

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<sup>13</sup> Ibid [59].

<sup>14</sup> *Peck v United Kingdom* [2003] EMLR, 15.

<sup>15</sup> *Jagger v Darling* (Unreported, UKHC, Bell J, 9 March 2005).

Jagger and Best were unaware that they were being filmed by a security camera. Someone passing close to where they were could have seen them, but they could not be seen otherwise. Although the incident took place in a fairly public place, this did not deny the claimant the likelihood of success in a privacy claim. Jagger did have a legitimate expectation of privacy. Bell J continued:

Although the claimant may be said to be guilty of misconduct in a most general sense, she was not in my view on the present information guilty of such moral turpitude as to prevent her seeking her remedy from the court.<sup>16</sup>

Bell J said the balance between Jagger's right to privacy and the nightclub manager's right to freedom of expression was firmly in favour of restricting publication. Jagger was understandably anxious to prevent footage getting on to the internet. The judge acknowledged the special protection for photographs adding, 'I can see no legitimate public interest in further dissemination of the images, which could serve only to humiliate the claimant for the prurient interest of others.'

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<sup>16</sup> Ibid.