

## UK ARTS LAW UPDATE

DAVID ATTFIELD<sup>1</sup>

### THE INTERNET AND PRIVACY

#### [235] **Motley Fool**

In *Totalise plc v Motley Fool Ltd & Anor*,<sup>2</sup> an internet service provider was able to obtain an order requiring *The Motley Fool*, a financial news website, to disclose the identity of the source of defamatory material posted by an anonymous contributor to their discussion boards. Owen J allowed an application under *Contempt of Court Act 1981* s 10 for an order for disclosure of the identity of a website user, which *The Motley Fool* had refused to do on the grounds that it undertook to its users that it was committed to protecting and respecting their privacy and that it would not disclose any details except as required by law.

*The Motley Fool* were unable to avail themselves of any relevant defence in the *Contempt of Court Act*, since on their website they expressly denied responsibility for what was posted on their discussion board and were therefore not responsible for the publication of the material within the meaning of the Act. The judge added that disclosure was necessary in the interests of justice, since to deny the order sought would be to allow people to defame with impunity on websites.

#### **The internet and confidential information**

*Sir Elton John & Ors v Countess Joubeline & Ors*,<sup>3</sup> was a case concerning a claim for breach of confidence arising from the publication on Countess Joubeline's website of confidential draft advice tendered to the claimants in relation to their high-profile action against PricewaterhouseCoopers.<sup>4</sup> Countess Joubeline, whilst not initially aware that the information had been posted on her website, on becoming aware of it created a link to the information from her home page giving it considerable prominence and making it easily accessible. She argued that she had received the

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<sup>1</sup> Solicitor, Lovells, London.

<sup>2</sup> *The Times*, 15 March 2001.

<sup>3</sup> Unreported, QBD, 26 January 2001.

<sup>4</sup> See 'UK Media Law Update' (2001) 6 *Media & Arts Law Review* 59.

information innocently and that the test of whether she knew or must have known that the information was imparted in confidence was subjective.

The Court rejected this. The test, it held, was whether she *ought* to have known that the information was being imparted in breach of confidence, and that as an intelligent person, the Countess must or ought to have known that advice from [236] counsel is confidential and privileged. She ought thus not to have allowed the information to remain on her website, and should not have created a link to it.

### **'Publication' on the internet**

In the case of *Loutchansky* (see below) it fell to the trial judge to decide on the status of copies of defamatory articles stored on newspaper internet archives. The issue arose from Loutchansky's claim against *The Times* for the continued availability of the articles in question on the newspaper's website. Gray J rejected *The Times*'s argument that the American 'single publication' rule should apply. This says that publication of an article on an internet site archive is deemed to take place only on the day on which it is posted provided the article remains untouched by the publisher thereafter. Gray J took the view that publication occurs each time somebody reads the article in question. This leaves the potential liability of newspapers greatly extended, and the usefulness of certain defences, such as qualified privilege, heavily compromised, in the case of articles which are archived on websites. It also has far-reaching implications for the defence of limitation making articles potentially actionable years after they are posted.

## FREEDOM OF EXPRESSION

### **Defamation and burden of proof**

In *John McVicar v United Kingdom*,<sup>5</sup> the applicant, was a journalist for *Spiked* magazine who had written an article in September 1995 suggesting that the athlete Linford Christie used banned performance-enhancing drugs. Linford Christie subsequently brought proceedings for libel which McVicar defended himself, since Legal Aid is not available for defamation actions and he was unable to afford legal

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<sup>5</sup> Unreported, ECHR, 10 May 2001, application 46311/99.

fees. Mc Vicar wrongly interpreted the Civil Procedure Rules and made a number of errors in serving his witness statements and expert evidence, with the result that the judge decided that the evidence of two of McVicar's key witnesses should be excluded.

Christie went on to win the action, the jury finding that McVicar had not proved the truth of the allegations he had made. McVicar's appeal to the Court of Appeal was dismissed. He has now appealed to the European Court of Human Rights, on a number of grounds. Of particular interest for current purposes is his argument that the burden of proof that he faced as a defendant under UK defamation law was a breach of his right to freedom of expression contained in art 10 of the *European Convention on Human Rights* (ECHR). McVicar also complains that the denial of Legal Aid to him as a defendant breached his right in art 6 of the ECHR to a fair trial.

The European Court decided that McVicar's contentions raised complex issues of law and fact which were best determined by examining the merits of the case. They therefore held McVicar's complaints to be admissible, to be determined at a full hearing on the merits of the case in due course.

Needless to say, the resulting decision could herald profound changes to English defamation law. If in due course the European Court decides that the media are not obliged to prove the truth of allegations which they make, and that instead the burden of proof is to be borne by claimants who must thus prove that stories are false, a considerable disincentive to bringing libel actions will have been created. Conversely, if it is decided that McVicar should have been able to apply for Legal Aid, whilst the Court may declare that this right is only applicable to defendants, it may extend the right to claimants as well. This could result in an increase in the number of libel actions brought in the English courts.

[237] **Interim injunctions and the Human Rights Act 1998**

In *Imutran Ltd v Uncaged Campaigns Ltd*,<sup>6</sup> the High Court ruled that the test for granting or refusing an interim injunction had essentially not changed under the *Human Rights Act 1998*, which incorporates the ECHR into English law.

The defendant, an animal rights campaigner, had been sent by an unknown source a CD-Rom. This contained copies of several documents belonging to the claimant, which carried out research into xenotransplantation (the replacement of human organs with those of animals). The defendant wrote a long series of 'Diaries of Despair', quoting widely from these documents. The claimant obtained injunctions until trial or further order restraining him from misusing confidential information and from infringing its copyright.

The court was required to consider whether to continue the injunctions. The defendant relied on s 12 of the *Human Rights Act 1998*, which provides that where a court is required to consider whether to grant interim relief when the art 10 right to freedom of expression could be affected as a result, such relief is only to be granted before trial if the court is satisfied that the applicant is likely to establish that publication should not be allowed.

The Court accepted that 'likelihood' was higher in the scale of probability than a 'real prospect of success' (the threshold established by cases preceding the *Human Rights Act*). However, the difference between the two was so minimal that there would be very few (if any) cases which would have succeeded under the old test but would now fail under s 12 of the *Human Rights Act*. The court should therefore apply the test of likelihood without considering how much more probable that now had to be.

As to the more general question of how the requirement under the *Human Rights Act* that the court must pay particular regard to the freedom of expression when considering applications for injunctions restraining publication, the Vice-Chancellor said that the court had already stressed the importance of freedom of expression long before the 1998 Act and were not required to place any more weight on the right now.

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<sup>6</sup> *The Times*, 30 January 2001.

In effect, he said that the requirement in the 1998 Act that the court should ‘pay particular regard’ to the importance of freedom of expression is no more than a statutory articulation of the court’s established practice of giving specific and separate consideration to the importance of that freedom.

### **The limits to freedom of expression**

In a case involving the former leader of the Liberal Democrat party, Paddy Ashdown,<sup>7</sup> the Court had to consider the extent to which a copyright owner’s rights were diminished by human rights law.

Ashdown had met the Prime Minister Tony Blair and others to discuss the possibility of a coalition cabinet. He later put a confidential minute of the meeting (typed by his secretary) in a safe. He also showed a copy of the note in confidence to colleagues, before shredding it. Later, in a radio interview, Ashdown referred to the coalition discussion. Shortly afterwards, the *Sunday Telegraph* published large parts of the confidential record. Ashdown sued for breach of confidence and copyright infringement, and sought summary judgment on his copyright claim.

The *Sunday Telegraph* relied on a number of defences, including an argument that the Court had to interpret the Act in such a way as to give effect to the ECHR right in art 10 to freedom of expression.

[238] The Vice-Chancellor held that art 10 could not be relied on to create defences to infringement claims over and above those offered by existing UK legislation.<sup>8</sup> The existing statutory defences had already struck a balance between the rights of the copyright owner and those of the public. Anything further would go beyond art 10(2), which permits the restriction of the right to freedom of expression only if ‘necessary in a democratic society’. The needs of a democratic society included the recognition of copyright.

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<sup>7</sup> *Ashdown v Sunday Telegraph, The Times*, 6 February 2001.

PRIVACY AND HARASSMENT

**Long lens photographs: Anna Ford**

This Press Complaints Commission decision concerned a complaint brought by a newsreader, Anna Ford, and her partner over photographs published in the *Daily Mail* and *OK!* of the couple on holiday. The pair complained that photographs taken of them in swimwear on a beach in Majorca intruded into their privacy in breach of cl 3 of the Code.

Given that a long lens had been used, and the couple had not consented, the Commission had to consider whether they had had a reasonable expectation of privacy. It held that they had not, since the beach was not private and was overlooked by several buildings. Furthermore, the complainants' relationship was in the public domain and the pictures were innocuous and of the kind taken of famous people regularly. There had therefore been no lack of respect for their private lives.

The couple are reported to be challenging this decision in the courts.

**Mills v News Group Newspapers**

Hot on the heels of the PCC decision in Anna Ford comes a decision which calls into question the extent of the right to privacy in English law.<sup>9</sup> In *Mills*, the claimant was a successful model who had become very well known for overcoming a disability caused by a serious accident and for becoming publicly associated with Sir Paul McCartney. Having contracted to buy a new house, in view of a number of disturbing emails which she had received, Mills was anxious to prevent details of the address of her new home becoming public knowledge. She therefore bought the house under an alias, and applied for an injunction without notice against *The Sun* newspaper to restrain the paper from publishing material which might reveal her address. She contended, amongst other things, that publication would breach her right to privacy under art 8 of the ECHR. However, whilst the Court accepted that it had jurisdiction to grant injunctions such as that sought in appropriate cases, under the *Human Rights*

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<sup>8</sup> The *Copyright Designs and Patents Act 1988*.

<sup>9</sup> See the leading case of *Douglas v Hello!*; 'UK Media Law Update' (2001) 6 *Media & Arts Law Review* 59.

*Act 1998*, the Court had to pay particular regard to the importance of the art 10 right to freedom of expression, and also to the extent to which the material had, or was about to, become available to the public in any event. Having weighed the various factors in question, Lawrence Collins J held that it was not an appropriate case for an injunction.

### **Secret filming by the police**

In *R v Loveridge (William)*, *R v Lee* and *R v Loveridge (Christine)*,<sup>10</sup> the Court of Appeal held that secret filming by the police of defendants in the cell area of a magistrates' court was unlawful and a breach [239] of their right to privacy under art 8 of the ECHR. Although the court was a public place, the defendants were filmed in part of the building to which the public did not have access. Article 8.2 provided an exception where the filming was for the prevention of disorder or crime, but such an interference had to be in accordance with the law. Nevertheless, the Court dismissed the appeals of the defendants against their convictions for robbery and taking a motor vehicle without consent on the basis that their trial had been fair notwithstanding the breach of art 8 and that their convictions were not in any way unsafe.

### **Esther Thomas: a successful action under the Protection from Harassment Act**

In a County Court decision in *Esther Thomas v The Sun*,<sup>11</sup> the plaintiff, Thomas, a former City of London police clerk, made a successful claim against *The Sun* newspaper under the *Protection from Harassment Act 1997*. Thomas contended that she had received racist hate mail as a result of two articles blaming her for disciplinary action which ultimately led to the demotion of two police sergeants and a £700 fine for a police constable arising from their treatment of a Somali asylum seeker. The articles included her name, address, place of work and the fact that she was black.

Thomas successfully established that 'strident, aggressive and inflammatory' newspaper articles are capable of causing 'alarm or distress' and that this can amount to harassment within the meaning of the 1997 Act. The judge held that the 1997 Act required a course of conduct, so that a single article would not be enough.

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<sup>10</sup> [2001] EWCA Crim 973, *The Times*, 3 May 2001.

OTHER NOTABLE CASES

**The limits of qualified privilege**

Few recent libel cases have engendered as much comment in England as *Loutchansky v Times Newspapers*, which has provided the most detailed guidance to date on the qualified privilege defence established in English law by the case of *Reynolds v Times Newspapers*.<sup>12</sup>

One of the most notable features of the case has been the Court of Appeal judgment on the preliminary question of whether *The Times* was entitled to amend its defence of qualified privilege to include matters which were not known to the newspaper at the time of publication of the article in question.

The Court of Appeal was clear that it could not. The Court considered previous cases on the point, in particular *GKR Karate (UK) v Yorkshire Post*,<sup>13</sup> in which the argument was advanced that what a journalist would have discovered had he made further enquiries was relevant to the consideration of 'all the circumstances of the publication' which had to be taken into account. In that case, May LJ rejected the defendant's argument, saying that 'circumstances' meant 'circumstances at the time': the crucial question was whether the public 'was entitled to know the particular information without [240] the publisher making further ... enquiries.' This was consistent with what Lord Nicholls had said in *Reynolds*.

The decision followed the settled principle that the defence of qualified privilege is founded on the 'duty-interest' test, requiring that the statement in question was published 'in pursuance of a duty, legal, social or moral to persons who had a corresponding duty or interest to receive it'. This duty, said Nourse LJ,

must exist at the time of publication ... The defendant must not only be under a duty to publish the statement but must honestly believe that he is. His belief must be judged at the time of publication and it can only be judged by the facts then known to him.

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<sup>11</sup> Unreported, see *The Guardian* (London), 13 March 2001.

<sup>12</sup> [1999] 3 WLR 1010; see 'UK Media Law Update' (1999) 4 *Media & Arts Law Review* 185.

The Court also looked briefly at the practical consequences of taking this approach. On the one hand, said Brooke LJ, if newspapers were permitted, once a complaint had been made, to search for material to support their decision to publish retrospectively, they would equally be able to withhold any material which pointed the other way as protected by legal privilege. Moreover, if newspapers were to be judged as if they had taken weeks or months more to make their enquiries or to see if further facts came to light, they would have had more time to seek out the complainant and obtain his version of events: 'It would then be likely that what they then published would be different from what they in fact published, and it is what they in fact published which is the subject of ... complaint'. Whilst the court acknowledged the right to freedom of expression in art 10(2) of the ECHR, it emphasised that the right is not absolute. Article 10(2) 'explicitly states that the right to freedom of expression carries with it duties and responsibilities' aimed at 'the protection of individuals' reputations'.

### **Perverse jury verdicts**

On 18 January 2001, the Court of Appeal took the unusual step of setting aside a jury verdict on the basis that it had been 'perverse, unreasonable and an affront to justice'.<sup>14</sup>

*The Sun* newspaper had claimed that a former football player Bruce Grobbelaar had accepted bribes to fix matches. Part of the evidence consisted of covertly-taken audio and video recording of Grobbelaar accepting cash from an associate and effectively admitting his guilt. He was charged with criminal offences, but after the jury had disagreed on their verdict twice, a 'not guilty' plea was entered. Grobbelaar then sued *The Sun* for libel. The jury unanimously found in his favour (rejecting the newspaper's claim of justification and qualified privilege) and awarded him £85,000 in damages.

*The Sun* appealed and the Court of Appeal allowed the appeal. Simon Brown LJ said that the footballer's attempts to explain his activities had been 'quite simply, incredible' and that they contained 'too many improbabilities piled upon another' to

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<sup>13</sup> [2000] 1 WLR 2571.

<sup>14</sup> *Grobbelaar v News Group Newspapers* (Unreported, EWCA, 18 January 2001) and see, eg, Frances Gibb, 'Ruling puts jury system in the dock', *The Times* (London) 19 January 2001.

'begin to be credible'. In the Court's view, the jury's verdict represented a miscarriage, which the court could and should correct.

However, the Court of Appeal rejected *The Sun's* defence of qualified privilege, and warned that newspapers which choose to publish exposés unambiguously asserting an individual's criminal guilt, do so at their own financial risk. There was no human right to disseminate untrue information, nor was there any public interest in being misinformed.

The ruling has left the footballer to pay costs of around £1.5 million. He was refused leave to appeal to the House of Lords.

#### [241] **McPhilemy v Times Newspapers Limited**

Talk that *Grobbelaar* might lead to more frequent attempts by newspapers to have jury verdicts set aside on the grounds of perversity has been quietened however following the recent case of *McPhilemy*,<sup>15</sup> which concerned a journalist who had brought proceedings against *The Times* in relation to an article which alleged that a programme which the claimant had made concerning Loyalist terrorists in Northern Ireland was a hoax. Upon the jury (to the apparent surprise of both parties) answering one of the questions put to them in favour of the claimant, *The Times* appealed on the grounds that the answer given was perverse. The appeal was dismissed however, on the basis that having successfully insisted that the judge leave the issue in question to the jury, in the face of the other side's submissions to the contrary, *The Times* had to accept the result and could not blow hot and cold. Moreover, there would be a public perception of unfairness were the claimant, having obtained a verdict in his favour, to be deprived of it by the Court of Appeal.

#### RECENT LEGISLATION

##### **Increased police powers to prevent doorstepping**

New powers for the police under the *Criminal Justice and Police Act 2001*, which came into force on 11 May, may reduce the practice of 'doorstepping' by the press.

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<sup>15</sup> Unreported, Court of Appeal, 12 June 2001.

Under s 42, if a constable believes that 'any person' outside or in the vicinity of an individual's home is there to persuade the individual to act in some way against his will, and if this is likely to result in harassment or to cause alarm or distress to the individual, the constable can order that person to leave the vicinity. Refusal to comply amounts to a criminal offence, carrying a potential punishment of three months' imprisonment and/or a fine.

Section 42 of the Act is designed principally to prevent demonstrators and activists from targeting private homes. However, it could also encompass journalists who knock on the doors of those involved in news or topical stories, hoping to get an interview from them in circumstances where they are reluctant to talk to the press.

The Editors' Code of Practice (and broadcasting regulatory codes) already contain provisions to ensure that doorstepping does not result in harassment or distress. Clause 4 of the Editors' Code states that journalists and photographers must not obtain or seek information/pictures through intimidation, harassment or persistent pursuit. In addition, if a journalist/photographer is asked to leave, he must not remain on their property. Clause 4, unlike s 42 of the Act is subject to public interest exceptions, for example the exposure of crime or serious misdemeanour. More importantly, it does not have the same force of law as s 42.

To some extent the same ground is also covered by the *Protection from Harassment Act 1997*. Section 1 precludes anyone from knowingly following a course of conduct which amounts to harassment. Conviction of an offence carries a potential six months' imprisonment and/or a higher fine than under [242] the *Criminal Justice and Police Act 2001*, although a journalist might be able to rely on the defence under s 1(3) if he could prove that he was doorstepping an individual for the purpose of detecting crime. However, he would also have to show that he acted 'under any enactment or rule of law' and that 'in the particular circumstances the pursuit of the course of conduct was reasonable'. Importantly, the *Protection from Harassment Act 1997* also enables individuals to bring civil actions for harassment.