



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Privacy & the media. Traditional and emerging protections in an online world.

IP/IT MEDIA & TELECOM- Workshop:

LONDON 2015

National Report of England and Wales

Alex Fox and Robert Griffiths

Penningtons Manches LLP
Abacus House
33 Gutter Lane
London EC2A 8AR

Telephone number: 0207 872 8559

Alex.Fox@penningtons.co.uk

Robert.Griffiths@penningtons.co.uk

General Reporters:

Jerome Debras, Woog & Associés, Paris, France
jdebras@woogassociés.com

Cristina Hernandez-Martí Pérez, Hernandez Martí Abogados, Barcelona,
Spain
cristina@hernandez-marti.com

17 March 2015

1. Privacy rights

Under Privacy right, we understand the right not to have information about a person to be disclosed to other persons without consent of the person the which the information refers to.

1.1. Are privacy rights statutory rights or are these case-law based?

There is no statutory right to privacy under English law. The Human Rights Act 1998 (HRA) imposed a requirement on English courts to act in a way that is compatible with the European Convention on Human Rights (the Convention), including Article 8, the Right to respect for private and family life.

A body of case law has grown up following the HRA that deals with certain principles of privacy.

1.2. What type of information (including pictures, sounds, etc.) would be covered by the concept of “privacy rights” in the legal system of your country?

Principles of privacy law will only apply in relation to types of information that engage Article 8 of the Convention. This includes communications, images, private information and private data (such as medical records).

1.2.1. Would the information included in that concept, or the extent of the privacy rights, depend upon the celebrity of the person, or upon other elements? Please describe briefly.

In order to engage Article 8 of the Convention an individual would need to have a reasonable expectation of privacy in the relevant information. The High Court considered what would be a reasonable expectation of privacy in the case of *Campbell v MGN Limited* [2004]¹.

Information which is in the public domain and no longer confidential cannot be protected. In the case of *Mosley v News Group Newspapers* [2008] the High Court refused to grant an interim injunction to prevent publication of photographs and video that was already widely available on the internet. However, damages and costs were payable.

The extent of the extent to which an individual can expect privacy in relation to certain information may rely will depend on the way in which that individual has conducted himself.

¹ <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/2004/22.html&query=campbell&method=boolean>

1.2.2. Would privacy rights also apply in relation to legal persons (vs. physical persons)?

Only if the legal person is protecting an individual's (i.e physical person) privacy.

1.2.3. Would privacy rights encompass private information made available only to some chosen persons (authorized recipients)? So, for instance, can disclosure to third parties, by one of the authorized recipients of the private information, be part of the privacy rights (e.g. disclosure of private correspondence, private phone calls, information shared on social media, etc.)

As above, the extent to which privacy rights are engaged under Article 8 will depend on the expectation of privacy to which the individual is entitled in relation to the specific information. If the information was imparted confidentially and it has not entered into the public domain due to the acts or omissions of the imparter then there is a good argument to maintain privacy.

1.3. Is there a specific status for “fictional use” of information related to an individual? And are disclaimers sufficient to allow such use?

The onus is on a claimant to prove that any words complained of were published about him. If a person is identifiable, or reasonable people would understand that the words referred to the claimant, the claimant may be able to bring a claim in defamation or malicious falsehood. If a claimant can prove that the words complained of were published about him, a disclaimer will have no effect.

2. Freedom of speech

2.1. Is there on the one hand a statutory/ treaty based freedom or constitutional recognition of “Freedom of speech” or on the other hand is that freedom based on case-law.

The HRA imposed a requirement on English courts to act in a way that is compatible with the Convention Article 10 right to Freedom of expression. Such rights need to be balanced.

2.2. If it is a statutory/treaty/ constitution based freedom is it based on domestic or supranational law?

It is a domestic requirement to act in accordance with relevant supranational law.

2.3. Describe the main characteristics of the “freedom of speech” as recognized in your jurisdiction:

2.3.1. beneficiaries;

2.3.2. extent of the freedom of speech;

2.3.3. exceptions;

2.3.4. specific status for press (including online press)?

The Article 10 right to freedom of expression is subject to the limitations set out in the Article. There are also broad exceptions, in particular where the words used are threatening, abusive or insulting and intended to cause (or objectively likely to cause) alarm or distress. There are further exceptions to prevent grossly indecent publications or words deemed to be an incitement to racial or religious hatred.

There are also exceptions introduced by the Terrorism Act 2006 which prevent incitement, encouragement or glorification of terrorism.

Other rules of law override freedom of speech in relation to privileged communications, trade secrets and other confidential information, and classified information.

In addition to all of the above exceptions, England and Wales have very strict defamation laws. A defamation claim may be brought in relation to any published statement about a named or identifiable individual that causes a reasonable person to think worse of them. There are various defences, most notably: truth (i.e that the published statement was true); honest opinion (a valid and honestly held opinion based upon facts that are true); public interest (where the publication was reasonably believed to be in the public interest) and privilege (which can be absolute, where the statement was made in parliament or in court, or qualified, where there is a mutual interest between the imparter and the impatee of the information and the imparter has a duty to impart the statement)

There was a specific exception for the press in relation to defamation known as the Reynolds Defence² whereby journalism undertaken in the public interest enjoys a complete defence against a libel claim. This was abolished by the Defamation Act 2013 and replaced by the Public Interest defence.

3. Hierarchy between Freedom of Speech on one side and privacy rights on the other side.

3.1. Under the law applicable in your jurisdiction, is there a clear hierarchy between freedom of speech on the one hand and privacy rights on the other?

There is no clear hierarchy between the Article 8 Right to respect for private and family life and the Article 10 right to Freedom of expression. They need to be balanced by the court, depending on the facts of the situation.

3.2. What would be the most significant criteria allowing freedom of speech or privacy rights to prevail over the other (e.g. public interest argument)?

² <http://www.bailii.org/uk/cases/UKHL/1999/45.html>

English courts will balance competing Article 8 and Article 10 rights based on the principles contained in the Convention and the case law of the European Court of Human Rights (ECtHR). Of particular significance is the principle of public interest, subject to the parameters laid down in *Von Hannover v Germany* [2004]. A vulnerable individual, such as a minor, is more likely to have their right to privacy protected.

4. Remedies available in your jurisdiction to protect individuals against disclosure of information belonging to their privacy

4.1. Are there pre-emptive remedies to avoid disclosure of such information before disclosure occurs? Describe briefly the main remedies available.

An interim non-disclosure order is the most commonly sought pre-emptive remedy. HRA s.12(3) states that “*no such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.*”

4.2. Are “gagging orders” or “super injunctions” as known in the UK known under the legal system of your country? Describe briefly their main characteristics.

Following the controversy in 2011 over so-called ‘super-injunctions’, the Master of the Rolls, Lord Neuberger, set up the Super-injunction Committee to examine the use of injunctions to bind the press to non-disclosure. The committee report confirmed that a super-injunction is an interim injunction which prohibits (1) publishing certain information, and (2) disclosing the existence of the injunction or the proceedings.³

The Master of the Rolls’ practice guidance (contained in Annex A to the report) states that super-injunctions “*can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice.*”⁴

The risk that is always present with super-injunctions is that the existence of the injunction is likely to be revealed sooner or later, and when it is revealed the party that has obtained the super-injunction can often be heavily criticised in the press. In other words, what can seem like a good idea at the time often backfires further down the line.

4.3. Are there other post-disclosure remedies, such as for example damage claims, rectification claims, right of answer. Describe shortly

³ <https://www.judiciary.gov.uk/publications/committee-reports-super-injunctions/>

⁴ <https://www.judiciary.gov.uk/publications/committee-reports-super-injunctions/>

The most common post-disclosure remedy is damages. In very rare cases exemplary damages (also called punitive damages), account of profits and delivery up or destruction of offending material may also be available. Where there is also a claim in defamation there may be a right to an apology.

4.4. In the case of damages, how are they calculated?

Damages are calculated at the discretion of the court. In *Mosley v News Group Newspapers Limited* [2008]⁵, J Eady laid down principles for the calculation of damages for breach of privacy, which included the following: damages must be proportionate, damages can take into account aggravating behaviour by the defendant, and damages cannot be awarded for the purpose of deterrence. In general, are low and are often dwarfed by the claim for legal costs (see *Campbell v MGN*).

4.5. In case of disclosure of private information, who can be held liable for damages, especially online?

The publisher. However, there are statutory defences to a non-edited publication where the publication is removed promptly upon notification on behalf of a victim.

4.6. Are there special defences to a cause of action for information disclosed by the press/ media?

Publication in the public interest is a defence to media intrusion of privacy under appropriate circumstances.

4.6.1. As part of your answer please explain what is range of news information organisations is covered by the definitions press/ media?

4.6.2. Is there a specific protection offered to informants/sources?

Sources are protected by freedom of expression under Article 10. This was upheld in the ECHR case of *Goodwin v United Kingdom* which stated that unless there was “an overriding requirement in the public interest” being ordered to disclose the identity of a source would violate the right to freedom of expression under article 10. This protection does not just cover traditional “journalists” - all individuals have the same right to “protect sources”

⁵ <http://www.bailii.org/ew/cases/EWHC/QB/2008/1777.html>

4.7. Are the principles described in your answers above also applicable to the online world? Is there any specific case-law in your country relating to social media, and if so please summarise this?

There have been a number of cases⁶ relating to interim non-disclosure orders where the information has become widely available on the internet, including on social media websites. The English courts have upheld injunctions even where the information has become widely available on the basis that they would nonetheless prevent further intrusion on the Claimant. Search engines such as Google are increasingly the recipient of applications for injunctions to prevent private information appearing in search results.

4.8. Are there specific remedies against disclosure of information that (could) damage an individual reputation (such as slander or libel)? Describe these remedies briefly.

The following remedies are available for the tort of defamation and/or malicious falsehood:

- Damages;
- Injunction; and
- Order to remove or cease publication.

4.9. Forum and applicable law

4.9.1. Describe shortly what rules are existing in your jurisdiction for the determination of the forum and the applicable law.

Forum shopping and so called “libel tourism” has been clamped down upon by the UK parliament in the Defamation Act 2013. Where a person is not domiciled in the UK or another member state, the court does not have jurisdiction to hear the action, unless it is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate.

4.9.2. Are there specific rules for breaches caused online (when the information is accessible from different jurisdictions)?

⁶ See:

<http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2011/3099.html&query=CTB&method=boolean>; and
<http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2011/1308.html&query=TSE&method=boolean>

4.10. From your experience, what reforms should be made to the legal system of your country to better protect individual privacy, if any?

It needs to be codified in statutes. The developing case law is unclear and causes significant costs to be incurred in testing the issues. This uncertainty can have a chilling effect on the media.

5. Interplay between data protection rules and privacy rights

5.1. Summarise how does data protection law in your jurisdiction protects privacy or other personal data being used in online media?

There is an exception in Section 32 of the Data Protection Act 1998 in order to allow the processing of personal data as part of the publication of journalistic material, as long as the data controller reasonably believes that the publication is in the public interest.

5.2. Is there an effective a right of opposition to collection of data?

Yes, under the Data Protection Act 1998, data must be obtained only for a specified lawful purpose and must not be processed in any manner that is not compatible with that process. The data must be adequate, relevant and not excessive.

Individuals have a right to ask the data controller not to process data if such processing is likely to cause substantial damage or distress. They also have the right to “opt out” of direct marketing.

6. Right to be forgotten

6.1. Is there a statutory or case-law based “right to be forgotten” in your jurisdiction (whether under domestic or supranational law)? Describe it briefly.

The right to be forgotten derives from the Data Protection Act 1998 (itself drawn from Directive 95/46/EC), as interpreted by case law. That is because when data becomes outdated, inaccurate or devoid of purpose it should no longer be stored by the data processor.

The right to be forgotten will be codified in more detail in the new Data Protection Regulation.

6.2. Is there relevant case law in your jurisdiction regarding the right to be forgotten and/or are there other guidelines (whether under domestic or supranational legal procedure) for a successful claim under the “right to be forgotten”.

The position in the UK is guided by the Article 29 working party guidance, adopted on 26 November 2014.

6.3. Did the view on the right to be forgotten change in your jurisdiction due to the European Court of Justice Case in Google Spain v. AEPD and González (C-131/12)? Is there any case law arising from this decision in your jurisdiction?

Yes. Google Spain changed the views of practitioners and data controllers. We are not yet aware of any case law in our jurisdiction.

Are there other aspects to take into consideration in your jurisdiction in relation to freedom of speech, the privacy right and the right to be forgotten?

Nothing that is not already covered above.