

Privacy: The Major Flaw The Horse Has Already Bolted!

London is the paparazzi capital of Europe providing photos for the ever increasing number of glossy colour magazines and the competing tabloid market. Media coverage and intrusion can be intense and even savage as, Max Clifford admitted to the recent House of Commons Select Committee on Culture, Media and Sport. There are still lurid kiss-and-tell in most of the Sunday redtops. Even the broadsheets are prone to delve intrusively into the private affairs of politicians. The Information Commissioner, Richard Thomas, has recently highlighted the unlawful trade in personal information and the extensive use by journalists of unlawfully obtained information, including voicemails, telephone and police records. Invasion of privacy by the media have not gone away; they are simply different.

Cheaper print costs and the internet have completely changed the media landscape and the legal landscape. Some intrusive stories can be difficult to stop if they appear on foreign websites, and stories and pictures can spread like wildfire in a matter of minutes. Standards of journalism are undoubtedly better, probably due to the effectiveness of the Press Complaints Commission and ultimately Fleet Street's fear of statutory regulation. However, the new technology (internet websites, e-zines, web-blogs and emails) and the intense competition for intrusive stories and photographs, with huge syndication deals, have brought new levels of press intrusion. Paparazzi can stalk, harass and hound people and cause serious danger to others and themselves in the race around the streets to get the valuable picture. Some try to provoke reactions so they can "capture" pictures of X or Y in tears. It is said that the intrusive nature of the British media deters decent people from pursuing public life.

Academics, politicians (e.g. Neil Kinnock in issue 17.2 of the BJR), even lawyers and judges, have all criticized the media and the PCC for falling press standards and many have called for statutory regulation of the media. However, the real debate has moved on. From the 1960's concerns over media invasions into privacy have resulted in a number of draft privacy bills being promoted, and since the early 1970's numerous committees have published reports, which, in general, have recommended greater regulation of the media. The Broadcasting Act 1981 created a Broadcasting Complaints Commission ("BCC") to deal with complaints about fairness and invasion of privacy. In 1996 this was replaced by the Broadcasting Standards Commission ("BSC"). The Communications Act 2003 created Ofcom, which replaced the BSC, the Independent Television Commission (ITC) and others. Statutory regulation of broadcasters has never been extended to the print

media. But in 1991 the Calcutt report recommended, amongst other things, that the Press Council should be replaced by a Press Complaints Commission ("PCC") which would have eighteen months to demonstrate "that a non-statutory self-regulation can be made to work effectively. If it fails we recommend that a statutory system for handling complaints be introduced." The press set up the PCC, avoiding a real threat of statutory privacy controls.

Recommendations rejected

Calcutt's 1993 review of self-regulation was highly critical and recommended a statutory complaints procedure. In 1995, the Conservative Government's White Paper, Privacy and Media Intrusion, rejected all recommendations for statutory regulation and for a new tort of invasion of privacy. It approved continuing self-regulation. The Labour Government continued this approach after 1997 and there are currently no Government plans for statutory press regulation - indeed, it is inconceivable that any government would bring in such legislation, probably because governments and MP's are reluctant to take on the media and to be seen to bring in press censorship, as the media would see it. Given that statutory regulation will never happen, it seems pointless to debate it further.

The role of the PCC and its interaction with the law is, however, of interest. Both the statutory and the non-statutory regulators have drawn up detailed codes of practice. These codes have acquired extra significance as a result of section 12(4) of the Human Rights Act (HRA), which requires the court to have particular regard to "any relevant privacy code" when considering any remedy which may affect freedom of expression. Section 12 of the HRA was brought in after representation from the media spearheaded by the then chairman of the PCC. Originally it was thought that section 12 of the HRA would protect the media. It is ironic that, in fact, section 12 has not had the intended effect. It is now clear that article 10 does not have priority over article 8; they have presumptive equality. The media codes now appear centre stage in any legal claim for invasion of privacy, and breach of the privacy codes may well persuade a court to find in the complainant's favour. At the very least, the codes do provide a minimum benchmark for journalism provided by working journalists.

The PCC code is also changing and being updated, but one glaring omission is the lack of any obligation to notify an intended target of the gist of any story before publication. This should be included as simple matter

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of fairness and decency but could also avoid costly mistakes for the publications involved. Maybe this should be the new clause 1 of the PCC code.

In the absence of statutory appeal procedures, the only remedy for a complainant who fails in their complaint to the PCC is to bring an application for judicial review or, since October 2, 2000, possibly a claim for damages under the HRA. There is no doubt that the statutory media regulators are "public authorities" for the purposes of judicial review and HRA proceedings. Non-statutory regulators are probably similarly reviewable. Judicial review has conventionally been seen as a process of "second order" review in which the courts consider the lawfulness of the decision-making process but not the merits of the decision. In general the Court would not substitute their decisions for those of public authorities, quashing a decision as unreasonable only if it is "so absurd that no sensible person could ever dream that it lay within the powers of the decision maker". This gives decision makers a very broad "margin of discretion". Provided a decision falls within this, the court will not interfere.

Where "fundamental rights" are involved, even in ordinary judicial review proceedings, the decision calls for "anxious scrutiny". Where a decision interferes with Convention rights, the court applies an even more stringent test of "proportionality". This requires courts to examine:

Whether the legislative objective is sufficiently important to justifying limiting the fundamental right;
Whether the measures designed to meet the legislative objective are rationally connected to it; and
Whether the means used to impair the freedom are no more than is necessary to accomplish that objective.

The doctrine of proportionality may require the reviewing court to assess the balance that the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. The proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.

The interpretation of "privacy" under the PCC code was considered in *R (Ford) -v- Press Complaints Commission*. The applicant, the well-known television journalist Anna Ford, sought permission to apply for judicial review of the PCC decision rejecting her complaint about the publication of intrusive photographs of her and her partner on a secluded but public beach abroad. Permission for review was refused on the basis of the

"broad discretion" given to the media regulators and the "extended deference given by the courts" to their decisions. In my view, this approach was not correct. In contrast to the decision in *Ex Parte BBC* (when the High Court found for the BBC after it appealed the BSC upholding a complaint over secret filming in Dixons' stores for a Watchdog programme) on which the court relied, the PCC was taking a narrow view of the ambit of "private life". In such situation it is not appropriate to defer to the regulator. This is a case in which the court should have made a primary judgment as to whether the applicant's privacy had been invaded by the publication of the photographs. This required a full hearing and I believe permission for judicial review should have been given.

Personal and family problems

The extent of the positive obligations to secure respect for private life and the role of the PCC has been considered in the United Kingdom cases in *Strasbourg*. The case of *Spencer -v- United Kingdom* concerned publication in tabloid newspapers of photographs and information about Countess Spencer being in a clinic for the treatment of an eating disorder and for alcoholism. Information about her personal and family problems was also published. The PCC had adjudicated in the complainant's favour, finding a breach of clause 3 of the Code. The Commission of Human Rights reviewed the common law development of the law of confidence. It found that, although there was no general right of privacy, the applicant had the remedies of injunction, damages or an account of profits available to protect privacy. As a result, the Commission dismissed the complaint, since the applicants had not "exhausted their domestic remedies".

On the other hand and more recently in *Peck -v- United Kingdom* - a case examined by Amber Melville-Brown in the preceding article in this issue of *BJR* - the European Court concluded that as Mr Peck had no effective remedy under domestic law, therefore the UK was in breach of its Article 13 obligation to provide effective remedies. Mr Peck, incidentally, also complained to the regulators the BSC, the ITC and the PCC, the last of which dismissed the complaint as inadmissible. The BSC and ITC upheld his complaints.

I suspect the PCC decisions on Ford and Peck might be different today. In any event, the adjudications of regulators, whether published, broadcast or merely received have limited effect. Since regulators seek to avoid repeating the offending material, the adjudication

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tends to be cryptic. Some adjudications are anonymous. This means they often have limited value in providing either vindication for the complainant or future guidance for the media.

There is no doubt that the possibility of adverse decisions by regulators does have some deterrent effect on the media. Some Ofcom decisions must be broadcast and, even though all adverse PCC decisions must be published, broadcasters tend to take more steps to avoid invasions of privacy than do newspapers. Although privacy is protected to a certain extent by regulatory bodies, which have had a significant effect, their powers are limited, and the ability to challenge their decision has, up to now, been limited. The major flaw in the regulatory system is that the regulators have no power to stop broadcast or publication. The only remedy is adjudication, by which time the information has already been published and the damage done.

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Published: British Journalism Review, September 2006