Confidence, Privacy and Damages: Hello! to Clarity...

...and goodbye to uncertainty?

The first round of post Human Rights Act 1998 (HRA 1998) privacy cases began with Michael Douglas, Catherine Zeta Jones and OK! magazine in the Court of Appeal seeking an injunction to restrain the publication of surreptitiously taken wedding photographs in Hello! magazine (Douglas v Hello! Ltd [2001] QB 967). Last week, following a full trial on liability ([2003] 3 All ER 996) and another on quantum, judgment was given for the claimants in the sum of £1,047,756 ([2003] EWHC 2629 (Ch)).

This protracted litigation has provided important clarification on the extent to which breach of confidence can be used to protect privacy. Taken with the recent decision of the House of Lords in Wainwright v The Home Office ([2003] 3 WLR 1137), it provides a convenient point for assessing just how far the protection of privacyhas developed in the past three years.

The Douglas case

The facts of Douglas v Hello! are now well-known. Film stars Michael Douglas and Catherine Zeta-Jones married at the Plaza Hotel in New York on 18 November 2000. Extensive security arrangements had been made, intended to ensure that access to the ceremony and reception would be denied to all but the family members and friends who had been invited and the attendant staff, who had been hired on terms they would keep the wedding confidential. The bride and groom hired their own photographers and it was made plain that no other photography was to be permitted. In making such arrangements the bride and groom were doing as they were bound under contract - they had sold exclusive photographic rights of the event to OK!, although they had retained control over the selection of such pictures. Unknown to the bride and groom, one photographer, had managed to evade security and had surreptitiously taken photographs which were then sold to OK!'s rival, Hello!, for publication in what has been described as "classic spoiler".

The Douglas's and OK! quickly applied for, and obtained, an injunction to restrain publication by Hello!. The injunction was lifted by the Court of Appeal on the basis that damages were an adequate remedy. Hello! published the unauthorised photographs on the same day as OK! (which had to bring its arrangements forward), published parts of the full authorised portfolio of photographs covering the event, approved by the Douglases, for which it had paid.

Ruling on liability

The liability trial took place over several weeks in 2003 before Lindsay J. In a comprehensive judgment ([2003] 3 All ER 996) he held that, because of the exceptional nature of a wedding and the elaborate and expensive security measures adopted by the Douglases, the event was private in nature and that the images of the couple were confidential. The exclusivity deal with OK! was a legitimate and reasonable way to control and limit the press exposure, and resulted in the information becoming a valuable "commercial trade secret".

Lindsay J found that subterfuge and surreptitious means had been used in obtaining the photographs. He also found that that the claimants had suffered detriment and damage, including the genuine distress in the realisation that someone had invaded and taken pictures of their wedding ceremony. There were a number of important points made in this ruling:

Even if the Douglases were public figures who had previously welcomed publicity, the confidentiality of their wedding was still protected. This can be contrasted with previous statements to the contrary in cases involving interim injunctions;

The sale by the Douglases of exclusive rights in information to OK! did not affect or reduce the level of protection;

The fact that private and confidential photographs were about to be published by OK! did not reduce protection under the law of confidence (but this plainly was a factor in considering whether to grant an injunction).

Having found for the claimants on liability, the judge ordered a quantum hearing.

Ruling on quantum

There were a number of aspects to the claims at the quantum hearing:

- A claim for distress suffered by the Douglases;
- A claim for damages by the Douglases under the Data Protection Act 1998 (DPA 1998);
- A claim by the Douglases for the costs of rearranging the provisions for preparing and sending the wedding photographs to OK!;

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- A claim by OK! for loss of revenue from the originally planned wedding double issues;

- A claim by all claimants for a notional licence fee, representing a reasonable payment for permission to publish the unauthorized photographs.

It was accepted that the notional licence fee approach and the other claims were mutually exclusive and that the claimants had the option of choosing whichever approach produced the highest sum (para 13). The judge did not consider the licence fee approach in detail as because such a fee would be only £125,000, substantially less than the damages award (see para 64).

After detailed analysis of the evidence in relation to damages, Lindsay J awarded compensation of £1,033,156 to OK! for loss of profit and wasted costs (para 58). He He found that the appropriate sum to award to the Douglases for distress was £3,750 each, and awarded them £7,000 each in wasted costs. He also awarded the Douglases £50 each in compensation under the Data Protection Act 1998.

In relation to damages for distress, the Judge said it was right "to separate distress occasioned by knowledge that there had been an intruder at the wedding and distress occasioned by the publication of the unauthorised photographs. Only the latter is to be laid at Hello!'s door" (para 55).

The award for distress does seem on the low side. An important factor in keeping the award at the bottom end of the scale appears to have been the fact that the Douglases had, to a substantial extent, already sold their privacy rightsto OK! for £1 million. If there had been no such exclusive sale arrangement, it appears that damages may have been very substantial and, on the basis of the "hypothetical licence" approach, may have been in excess of £125,000.

In relation to OK!, the Judge looked at the sales thatmight have been achieved if it had been able to publish two "exclusive" wedding photograph issues and arrived at a net figure of £1,026,706. In doing so, he accepted expert evidence from former Sun editor Kelvin MacKenzie that Hello!'s "spoiler" would have had a devastating effect on the sales of the OK! special issues (para 50). The Judge considered the potentially chilling effect on freedom of expression of such an award. He said:

"Further, looking at this substantial award in a general way, as encouraged by some of the authorities, I would not regard it, given the resources of Hello!, as of a size that is likely materially to stifle free expression and yet, without its going beyond the compensatory and into the penal, it is, I would expect, such as may make Hello! alive to the unwisdom of its acting as it did"
This judgment echoes the recent Privy Council case of Gleaner v Abrahams [2003] 3 WLR 1038 in relation to libel awards, a salutary warning to the media in "spoiler" cases.

Privacy: where are we now?

The award of damages in Douglas provides a convenient opportunity to stand back and survey the current privacy landscape. The recognition of a post-Human Rights Act 1998 privacy right in English law has been, at best, uneven. A turning point appeared to have been reached in 2003. In January the Strasbourg Court decided Peck v UK (2003) 36 EHRR 41. The case concerned CCTV footage of a man with a knife walking along a public street, and the subsequent council decision to release the CCTV footage to television and local newspapers. In fact Mr Peck, who was depressed, had slashed his wrists in a suicide attempt. Mr Peck tried unsuccessfully to obtain judicial review of the council's decision and also complained to the BSC, the ITC and the PCC (the media regulators).

The PCC dismissed the complaint as inadmissible. Mr Peck claimed that his Article 8 rights had been infringed; his claim was upheld. The court said the exposure he was subjected to far exceeded anything that he could reasonably have anticipated. The court went on to conclude that as Mr Peck had no defective remedy under domestic law, the UK was in breach of its Article 13 obligation to provide effective remedies. This appeared to highlight the glaring lack of domestic "privacy remedies". In June 2003, the Select Committee on Culture Media and Sport issued its report concerning privacy and media invasion. Having heard extensive evidence from victims and from the media, the committee also made extensive reference to the Douglas litigation and the decision in Peck. The committee concluded:

"On balance we firmly recommend that the government reconsider its position and bring forward legislative proposals to clarify the protection that individuals can expect from unwarranted intrusion by anyone - not the press alone - into their private lives. This is necessary to fully satisfy the obligations upon the UK under the European Convention on Human Rights."

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The response of the government was swift and unequivocal. On the same day, it issued a statement saying that it had no intention of bringing in specific legislation to protect privacy. The government's formal response in early October 2003 was that, that following the Human Rights Act 1998, the government is content to let the courts deal with the issue: "The weighing of competing rights in individual cases is the quintessential task of the court, not of government or of parliament. Parliament should only intervene if there are signs that the courts are systemically striking the wrong balance; we believe there are no such signs."

Unfortunately, for media lawyers, the courts have taken the opposite view. On 16 October 2003, the House of Lords gave judgment in Wainwright v The Home Office [2003] 3 WLR 1137. This decision has been widely criticised as too conservative, but it should be borne in mind that it was made in respect of a case bought prior to the implementation of the Human Rights Act 1998. The House of Lords refused to hold that there has been a previously unknown tort of invasion of privacy, since 1950 at least. A restrictive view was taken of the effect of Peck (para 33). However, Lord Hoffmann appeared to accept that a "confidential relationship" was no longer necessary to establish a "breach of confidence" claim (para 29).

It is plain that the privacy legislation will not be brought in for the foreseeable future. Although the House of Lords took a restrictive approach to Peck, the Strasbourg court is presently considering a broad approach to Article 8 in the media context. In Hannover v Germany Princess Caroline of Monaco argued that the apparently powerful German laws did not provide an effective remedy to protect her Article 8 rights. The application was found to be admissible and the merits hearing took place on 6 November 2003. Judgment is awaited.

The Wainwright decision did not engage with a number of other significant recent developments in the privacy field. In A v B plc [2003] QB 195, the Court of Appeal was prepared to accept that no pre-existing confidential relationship between the parties was required. Lord Woolf MR stated:

"If there is an intrusion in a situation where a person can reasonably expect his privacy to be respected, then that intrusion will be capable of giving rise to a liability in action for breach of confidence unless the intrusion can be justified… The bugging of someone's home or the use of other surveillance techniques are obvious examples of such an intrusion."

The broad extension of the circumstances in which a duty of confidence can arise remains to be worked out in the case law. Nevertheless, it has been recognised by the Court Of Appeal in D v L [2003] EWCA Civ 1169 that the publication of a covert tape recording of a private conversation involves a breach of confidence, and publication of a tape or photograph may also be more intrusive than the publication of the information which it contains.

Whose responsibility?

The present position is obviously unsatisfactory. The government and the courts are both refusing to take responsibility for the protection of privacy. The Douglas case illustrates that where private information can be described as commercially confidential, substantial damages may be recoverable. In the personal sphere, it seems that any decisive impetus will have to come from Strasbourg.

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