SOLICITORS JOURNAL

One rule for the rich …

30 January 2004

While those in the public eye often gain injunctions to prevent the publication of items which 'invade their privacy', the general public rarely succeed with privacy claims. Rupert Butler looks at the legal stalemate on this issue

28 January 2004 was the anniversary of the European Court of Human Rights' 'landmark' judgment in *Geoffrey Peck v United Kingdom* (44647/98), which found that Peck (P) had no effective legal remedy, in our jurisdiction, for an unwarranted interference with his right to respect for his private life, guaranteed by Art 8 of the European Convention on Human Rights (the Convention). However, despite this gap, the Government and the courts are pointedly refusing to develop a 'law of privacy' and so failing in our Convention obligations.

Peck case

In 1995, P was depressed and attempted suicide. Shortly afterwards, he was filmed, late at night, on local authority CCTV cameras, brandishing a knife in Brentwood town centre. The police took P into protective custody and then released him without charge. However, to promote the effectiveness of CCTV surveillance, the local authority allowed different media to publish and broadcast P's image. His friends and family recognised him and so discovered his emotional difficulties.

P did not complain about being photographed, but tried to challenge the decision to disseminate his image and was refused permission to pursue an application for judicial review in the Divisional Court and the Court of Appeal. The judge at first instance commented that the injustice of P's case might be cured by a general law of privacy, which he heralded with the advent of the Human Rights Act 1998 – sadly, he was wrong.

So P took his case to Strasbourg, whose power to give him compensation became engaged when he had no effective legal remedy in his home jurisdiction, in breach of Art 13 of the Convention. The Government argued that the existing common law and statutory regimes already provided a comprehensive range of legal protection and that the courts were continually developing the law of confidence. The European judges examined P's potential private law remedies for breach of confidence, misfeasance in public office, defamation, malicious falsehood, nuisance and breach of copyright and found that none of them fitted his circumstances. They found no comfort for P in statutes such as the Protection from Harassment Act 1997. They awarded him damages for his 'significant distress, embarrassment and frustration'.

Effect of Human Rights Act

The events in P's case took place before the Human Rights Act 1998 came into force in October 2000, by which the Convention became incorporated into our domestic law, and before Sedley LJ's apparent formulation of a qualified

general right of privacy in *Douglas v Hello!* [2001] QB 967: "the law no longer needs to construct an artificial relationship of confidentiality between intruder and victim; it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy".

Lord Woolf MR, in *A v B plc* [2003] QB 195, also found that it is not necessary to have a pre-existing relationship with another party in order to have a confidential relationship with them. He decided that if a person can reasonably expect his privacy to be respected then any intrusion may give rise to liability in an action for breach of confidence. For a while, it looked as if judicial interpretation of our Convention obligations might be moving towards filling the gap by creating an independent right to privacy.

Ms A's case

However, since then in *A Local Authority v (1) A Health Authority (2) Ms A* [2003] EWHC Fam 2746 Dame Elizabeth Butler-Sloss held that, unless existing categories of protection of confidence or privacy could be extended to fit the facts of Ms A's case, she had no claim to prevent publication of a Local Area Child Protection Committee's report into the management of her home. This case highlights the problem – if senior judges like Dame Elizabeth Butler-Sloss are not prepared to take the plunge, how will the law ever be extended or developed to recognise greater free-standing rights to privacy?

Wainwright case

The case of *SoS for the Home Department v (1) Mary Wainwright (2) Alan Wainwright* [2003] UKHL 53 concerned a claim about the manner in which individuals were strip-searched prior to visiting relatives in prison. Mrs Wainwright was humiliated and distressed by the ordeal but suffered no injury or illness. Her son suffered an assault when his genitals were touched, which led to post-traumatic stress disorder. The judge at first instance held that there should be a pecuniary remedy for distress when the Wainwrights' Art 8 right to privacy was breached. However, this was rejected in the Court of Appeal and the House of Lords.

In the lead judgment of a unanimous House, Lord Hoffmann held the view that 'privacy' is a value, not a legal right, that is not readily capable of definition. If there is to be a 'law of privacy' Lord Hoffmann says that its creation is a matter for Parliament and not the courts. In support he cited earlier attempts to fill a gap by extending private law remedies which failed until a statute came to the rescue, such as the tort of nuisance by telephone harassment, created in *Khorasandjin v Bush* [1993] QB 727, subsequently rejected in *Hunter v Canary Wharf* [1997] AC 655, but recognised in the Protection from Harassment Act 1997. He endorsed Sir Robert Megarry VC's statement in *Malone v Metropolitan Police Commissioner* [1979] Ch 344 that it was not the function of the courts to legislate in a new field – extension of law is one thing, creation of new rights is another. That case on phone-tapping led to the statutory remedies provided in the Interception of Communications Act 1985 and, similarly, *R v Khan (Sultan)* [1997] AC 558 led to anti-eavesdropping provisions in the Police Act 1997.

By these examples Lord Hoffmann believes that the *Peck* decision does no more than show that there needs to be

statutory regulation of the use of CCTV footage and not the broad brush of the common law. He limits the generous formulation made by Sedley LJ by interpreting it as no more than a plea to extend and possibly rename the action for breach of confidence and distances the courts from the concept of a general 'law of privacy'. So, a year on from *Peck* and the courts are retrenching while passing responsibility on to Government to introduce any necessary legislation.

Comment

The injustice of the position after Lord Hoffmann's speech in *Wainwright* is that, even after P was pictured in 1995, even after the Human Rights Act 1998, even after the decision in *Peck v United Kingdom* a year ago, and even after all the intervening cases brought in the last eight or so years attempting to define a general law of privacy, P would still not have a remedy if he went into Brentwood town centre and history repeated itself. Can this be right?

With no legislation on the horizon, any development is going to take place in the courts piece-meal and at a snail's pace. This also throws up another problem. Cases involving alleged breaches of privacy are falling into two distinct categories, which create anomalies: they either involve celebrities or have exceptional facts, like *Peck* and *Wainwright*.

Michael Douglas and Catherine Zeta-Jones (*Douglas v Hello! Ltd* [2001] QB 967, [2003] 3 All ER 996, and [2003] EWHC 2629) have won massive damages for invasion of the privacy, when unauthorised photographs were taken of their wedding and published in a rival magazine to the one with whom they had agreed an exclusive publishing deal. Their claim of a 'right to privacy' was nothing of the sort, but a right to commercially exploit themselves as they saw fit.

Jamie Theakston and Gary Flitcroft wanted to suppress revelations about their social habits by trying and failing to impose silencing injunctions upon ladies with whom they have liaised. Naomi Campbell was photographed leaving a drug counseling clinic, but tried to suppress publication of her hypocrisy in claiming to be against the use of drugs.

On 1 November 2003, McKinnon J granted an injunction in favor of Michael Fawcett, a former member of Prince Charles' staff, to prevent publication in the Mail on Sunday of an allegedly libelous interview given by someone claiming to have witnessed a private act between Prince Charles and Fawcett. It is extremely unusual to grant prior restraint of a publication, which is a serious challenge to the right to freedom of expression guaranteed by Art 10 of the European Convention on Human Rights. At one level this is an act of censorship and an unwarranted infringement on the right of the witness to tell his story. At another level, this is recognition of a right to privacy to prevent disclosure of private facts. We will never know if the article would have been libelous because the injunction will prevent us being able to judge its accuracy or see it tested before a jury in the libel courts. The injunction remains in place.

On 11 November 2003, Ewan McGregor, the actor, obtained default judgment against a French photo agency on the grounds that it had invaded his family's Art 8 right to privacy by hawking pictures of him and his children taken while they were on holiday.

So there is limited relief to the rich and famous but nothing for the Pecks and Wainwrights, and, in this climate, it is hard to envisage any case in which ordinary members of the public will have the stomach to fight in the courts and then be prepared to take the long road to Strasbourg in search of an effective remedy – it took P about six years. If Parliament refuses to act while there is an appetite to accept a general right of privacy, then Lord Hoffmann is wrong and we need him and his fellow judges to get out the broad brush of the common law and start sweeping away these injustices.

Stalemate on call for reform

Glidewell, Bingham and Leggatt LJJ also made the judicial plea for legislative reform when they found shortcomings in our law of privacy back in the case of *Kaye v Robertson* [1991] FSR 62. The actor Gordon Kaye was in hospital with serious head injuries, when a newspaper photographed and 'interviewed' him without his consent while he was insensible. There was no remedy except a limited injunction to prevent any suggestion that he had been interviewed voluntarily. However, at around the same time, the Calcutt Committee, set up to investigate press intrusion, reported in 1990 that it could not recommend a generalised tort of invasion of privacy because problems of definition would lead to an unacceptable degree of uncertainty. This stalemate between the roles of legislative and judicial law-makers in the field of privacy still exists. In June 2003 the Select Committee on Culture Media and Sport issued a report in which it urged the Government to bring forward legislative proposals to clarify the protection individuals can expect from unwarranted invasions of their privacy. However, in spite of this, and in spite of the forceful arguments of Lord Hoffmann, the Government's response dashes any hope of new law saying: "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 systematically striking the wrong balance; we believe there are no such signs." So the courts are leaving it to Parliament and the Government is leaving it to the courts – impasse!

Postscript:

Rupert Butler is a barrister practicing from 3 Hare Court, Temple

rbutler@3hare court.com

This article was first published in the Solicitors Journal, 30 January 2004