

Kiss, don't tell!

Privacy or freedom of expression? **Mark Pawlowski** surveys the laws covering gossip & scandal



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IN BRIEF

► Sets out case law on publication and the prevention of publication.

Facts within the public domain?

In *Stephens v Avery* [1988] Ch 449, [1988] 2 All ER 477 the claimant communicated information to the defendant relating to her sexual conduct with another woman. Subsequent details of the relationship appeared in a newspaper article. Sir Nicholas Browne-Wilkinson VC held that equity would intervene to protect confidential information on the basis it was unconscionable for the recipient to reveal that information and that was so whether it had been given expressly in confidence or by implication where the relationship between the parties imposed a duty of confidence. In the words of the Vice-Chancellor, at [454]: 'To most people the details of their sexual lives are high on their list of those matters which they regard as confidential. If in fact information is secret, then in my judgment it is capable of being kept secret by the imposition of a duty of confidence on any person to whom it is communicated. Information only ceases to be capable of protection as confidential when it is in fact known to a substantial number of people.'

Ultimately, however, it is a question of degree whether the information is known to a sufficiently large section of the public. The point arose in *Barrymore v News Group Newspapers Ltd* [1997] FSR 600, where the claimant, a married man, had had a homosexual relationship with the second defendant, who provided information concerning it to the first defendant for publication in *The Sun* newspaper. Jacob J upheld the claimant's application for an interim injunction concluding that, in principle, there was no reason why information relating to sexual conduct could not be the subject of a legally enforceable duty of confidentiality. On the facts, there was a strongly arguable case the details of the parties' relationship fell to be characterised as confidential.

The information presented in the *Sun* newspaper article was not known to a substantial number of people before its publication. It was an 'exclusive' and went beyond merely indicating the fact of the

homosexual relationship (something which the claimant had already disclosed publicly) and provided intimate details of the parties' sexual conduct. This, clearly, crossed the line into breach of confidence. Similarly, in *Douglas v Hello! Ltd* [2001] 2 All ER 289, [2001] QB 967, Keene LJ acknowledged there may be different degrees of privacy. The more intimate the aspect of private life which is being interfered with, the more serious must be the reasons for interference to render it legitimate. In particular, his Lordship identified personal sexuality as 'an extremely intimate aspect of a person's private life' (at [330]).

In *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] 4 All ER 554, the Supreme Court upheld an interim injunction restraining publication of a story about a celebrity's extramarital sexual activities. Although the story and the celebrity's identity had been widely published overseas and online, the injunction served the purpose, pending a trial, of preserving the privacy interests of the celebrity, his partner and their young children. No genuine public interest in publication had been disclosed and without the interim injunction there would be further unrestricted and extensive coverage which would undermine the purpose of any trial.

Human rights dimension

In *A v B plc* [2003] QB 195, [2002] 2 All ER 545, the claimant, a married man with a family, was a professional footballer. He had extramarital affairs with two women who sold their stories to the defendant newspaper. It was common ground the parties were seen in public together at restaurants and clubs. The newspaper had drafts of two articles which it proposed to publish containing details of the sexual activity between the claimant and the two women. When he learned the newspaper sought to publish the articles, the claimant sought an interim injunction restraining publication on the ground, inter alia, of breach of confidence.

The Court of Appeal recognised there was an underlying tension between the operation of Art 8 of the European Convention (right to respect for private and family life) and Art 10 (protection of freedom of expression).

This tension inevitably required the court to balance (and give proper weight to) the conflicting interests each Article was designed to protect.

The court also acknowledged that, while public figures and celebrities are entitled to have their privacy respected in appropriate circumstances, they must expect their actions to be more closely scrutinised by the media. In the instant case, it was apparent that footballers were role models for young people and undesirable behaviour on their part could set an unfortunate example. Although the claimant had not courted publicity, it was apparent that someone holding his position was inevitably a figure in whom a section of the public and the media would be interested. Accordingly, the degree of confidentiality to which the claimant was entitled was only very modest. The injunctions granted at first instance were, accordingly, set aside.

Privacy v freedom of expression

In *XLD v KZL* [2020] EWHC 1558 (QB), the claimant, a married US citizen, had met the defendant through a website that connected people looking for a 'sugar daddy/sugar baby' arrangement. They exchanged messages which quickly became sexually explicit. Shortly after the messaging began, the defendant made a financial demand, which the claimant paid. Communication changed to emails. The defendant's demands for money continued and she threatened to tell the claimant's family about his activities. Between 2019 and 2020, the claimant paid £125,000 to the defendant.

The court granted an interim injunction preventing harassment and misuse of private information on a without notice application by the claimant: see also, *BVC v EWF* [2019] EWHC 2506 (QB), [2019] All ER (D) 14 (Oct) (summary judgment given on a claim for misuse of private information arising from a website created by the defendant disclosing details of his sexual relationship); *BVG v LAR* [2020] EWHC 931 (QB), [2020] All ER (D) 119 (Apr) (summary judgment awarded to a claimant on his claims for misuse of private information and harassment where the defendant had threatened to publish secretly recorded video footage of the claimant's sexual

activities); *SOJ v JOA* [2019] EWHC 2569, (interim injunction granted to wealthy and well-known businessman restraining his former partner from disclosing the fact of their intimate relationship and her allegation that she contracted a sexually transmitted infection from him).

In *YXB v TNO* [2015] EWHC 826 (QB), [2015] All ER (D) 285 (Mar), the claimant, a Premier League footballer, and the defendant had engaged in sexual activities at the house of the claimant's friend and the claimant had sent intimate images of himself to the defendant. The defendant contracted to sell her story to a newspaper. The claimant's friend and the claimant's agent gave evidence that they had agreed they should meet the defendant to find out her position, and that she had demanded £100,000 from them. The defendant, however, served evidence that the sex act had been witnessed by several people, that the claimant's friend had offered her money and that she had not demanded it. The defendant also gave, as undisputed evidence, a text message she had sent to the claimant's friend, stating she was not interested in any more offers of money from him. Moreover, she had agreed not to publish any images.

The court held that it was not appropriate to continue interim orders maintaining the parties' anonymity and restraining disclosure of the parties' sexual acts. In the light of the defendant's undisputed evidence, what was left were relatively weak privacy claims: see also, *Wan-Bissaka v Bentley* [2020] EWHC 3640 (QB), where a Premier League footballer was granted an interim injunction preventing his ex-girlfriend from publishing further private information from their relationship after she had posted screenshots of their private messages on Instagram and was likely to continue unless restrained by an injunction.

Art 10 rights favoured

In *McClaren v News Group Newspapers Ltd* [2012] EWHC 2466 (QB), [2012] All ER (D) 22 (Sep), a professional football manager, who had previously managed the England team, was refused injunctive relief restraining publication by a national newspaper of private information relating to a sexual encounter between him and a third party. While his rights under Art 8 were engaged, the balance lay in favour of the newspaper's rights under Art 10 as there was a legitimate interest in publishing a story about a public figure from whom a higher standard of conduct was expected.

In *AAA v Associated Newspapers Ltd* [2012] EWHC 2103 (QB), [2012] All ER (D) 303 (Jul), the court held there was an exceptional public interest in the

professional and private life of an elected politician such as to justify the publication of a newspaper article claiming that a child had been born as a result of his extramarital affair.

In *CDE v MGN Ltd* [2010] EWHC 3308 (QB), [2011] All ER (D) 108 (Jan), on the other hand, the court continued an interim injunction restraining the publication of a story about the claimant television personality's extra-marital quasi-relationship (which extended to flirtatious, intimate and personal text messages, emails and tweets and, on two occasions, brief face-to-face meetings) as the public interest in the story and the proposed publishers' right to freedom of expression under Art 10 were likely to be outweighed by the potential the story had to infringe the rights of the claimant and his family under Art 8: see also, *AXB v BXA* [2018] EWHC 588 (QB) (injunctions granted restraining an individual from harassing a married man and disclosing private information about their affair as she presented a continuing risk of embarrassment and distress to him and his family); *CC v AB* [2006] EWHC 3083, [2006] All ER (D) 39 (Dec) (court held there was no general rule that an adulterer could never obtain an injunction to restrain the publication of matters relating to his adulterous relationship).

In *RST v UVW* [2009] EWHC 2448 (QB), [2009] All ER (D) 222 (Oct), the applicant (ten years previously) had paid a woman for sexual encounters, which had taken place at his home. A couple of years later, she had threatened to publish information about them, as a result of which he paid her to enter into a written non-disclosure agreement. The agreement specified that it had been made in confidence and that neither its existence nor its terms should be disclosed. The applicant later received an email from a person whose name he did not recognise threatening to publish a story about the sexual encounters and the agreement. Not surprisingly, the court granted an interim injunction to restrain the respondent from disclosing the confidential information.

In *Re KT* [2005] EWHC 3428 (Fam), the applicant, who was 18, applied for an injunction to prevent interference with his right to private and family life. When he was 13, he had been excluded from school following a finding that he had sexually abused another pupil. A psychiatrist instructed by the applicant's headmaster to prepare a report concluded the applicant had been responsible for a range of very serious sexual assaults on the pupil concerned. The psychiatrist had reached that conclusion without meeting the applicant or any members of his family and without interviewing anyone involved

in the allegations against him.

The applicant brought a successful application for judicial review of his exclusion, the judge having concluded there had been no proper foundation for any findings the applicant had sexually abused another pupil. The local press had written articles about the case which gave sufficient detail to enable the applicant to be identified. In these circumstances, the court granted an injunction to prevent interference with his right to private and family life and/or breaches of his right to privacy and confidentiality.

Judicial guidance

In *PJS*, mentioned earlier, Lord Mance stated, at [32]: 'Every case must be considered on its particular facts. But the starting point is that (i) there is not, without more, any public interest in a legal sense in the disclosure or publication of purely private sexual encounters, even though they involve adultery or more than one person at the same time, (ii) any such disclosure or publication will on the face of it constitute the tort of invasion of privacy, (iii) repetition of such a disclosure or publication on further occasions is capable of constituting a further tort of invasion of privacy, even in relation to persons to whom disclosure or publication was previously made—especially if it occurs in a different medium.'

In deciding, however, whether to grant interim injunctive relief, the courts have to apply s 12 of the Human Rights Act 1998 and, before restraining publication prior to trial, have in particular to be 'satisfied that the applicant is likely to establish that publication should not be allowed'. In addition, under s 12(4), particular regard must be had to the importance of the Art 10 right to freedom of expression, although that right has no necessary claim to priority over the need to have due regard to any Art 8 privacy right claimed by the applicant.

Where the proceedings relate to journalistic material (or conduct connected to such material) the courts must also have particular regard, under s 12(4)(a), to two specific factors which point potentially in different directions: (i) the extent to which the material has, or is about to, become available to the public; and (ii) the extent to which it is, or would be, in the public interest for the material to be published. Under s 12(4)(b), the courts must also have particular regard to any relevant privacy code: see, *PJS*, at [33]. As we have seen, each case will fall to be decided on its own particular facts.

NLJ